Supreme Court, U.S.
(1)
001167 JAN 18 2001
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

TAHOE SIERRA PRESERVATION COUNCIL, Inc., a California non-profit corporation and membership organization, *et al.*

Petitioners,

v.

TAHOE REGIONAL PLANNING AGENCY, a separate legal entity created pursuant to Bi-State Compact, *et al.*

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

LAWRENCE L. HOFFMAN
HOFFMAN LAW OFFICES
3000 No. Lake Boulevard
Post Office Box 7740
Tahoe City, CA 96145
(530) 583-8542

MICHAEL M. BERGER*
GIDEON KANNER
BERGER & NORTON
A LAW CORPORATION
1620 26th Street
Suite 200 South
Santa Monica, CA 90404-4040
(310) 449-1000

**Counsel of Record*
Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

22580

QUESTIONS PRESENTED

1. In light of this Court's clear holding that a temporary moratorium on land use *can* require compensation for a temporary taking of property (*First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 [1987]), is it permissible for the Ninth Circuit Court of Appeals to hold – as a matter of law – that a temporary moratorium can *never* require constitutional compensation?

2. Can a land use regulatory agency escape its constitutional duty to pay for land taken for public use by the expedient of enacting a series of rolling, back-to-back "temporary" moratoria/prohibitions extending over a period of 20 years, and then claiming that each of the individual prohibitions on *all* use must be viewed in isolation from the others and, when so viewed, none was severe enough by itself to cross the constitutional taking threshold?

In similar fashion, can such an agency escape the constitutional obligation of compensation because a court injunction issued in a *different* case barred issuing permits to *other* landowners, while the agency's own regulations precluded all use of the Petitioners' land?

3. Can a land use regulatory agency purport to "protect the environment" at a major regional location (here, Lake Tahoe) by compelling a selected group of individual landowners to forego *all* use of their individual homesites, and thereby compel a *de facto* donation of their land for public use without compensation?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The Petitioners, in addition to Tahoe-Sierra Preservation Council, Inc., are:

BRUCE A. AMES and JUDITH M. AMES
LAURA L. ANDERSON and JAMES E. ANDERSON
ALFRED J. ANTONINI
CAROLYN J. APPLEBY
EDWARD ARRI and BARBARA ARRI
GEORGE P. ASCHE and PRISCILLA J. ASCHE
ALPINE INVESTMENT
NICK BADAMI
M.A. BEHR and ESTHER M. BEHR (ESTATE OF)
CLARENCE C. BENEDICT
MAX B. BENTLEY and MINNIE R. BENTLEY
LEROY G. BLACK
RICHARD A. BLASCO and AIDA M. BLASCO
ARLETTE I. BROWN (ESTATE OF)
ARTHUR C. BYSTROM
ALLAN F. CASE and TERUKO CASE
EDWARD W. CISLO, JR. and
LA VERNE C. CISLO (SILVERMAN)
JAMES D. CLEMENT
ROBERT D. COLCLAZIER
JAMES R. COMPTON
CARL D. COOK
DOROTHY MAE COOK
HAROLD F. CORNELIUS
JOAN COSTA (MAILHOIT)
OLGA R. CROSETTI (ESTATE OF)
ALAN W. DAGG
GWENDOLYN IONE DAY
EDDY K. DAYNE (ESTATE OF) and ANNE M. DAYNE
RICHARD DEFENBAUGH and
TERESA DEFENBAUGH

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT – Continued

JOHN J. DESTEFANO
JESS R. DETEVIS and DIANE DETEVIS (ESTATE OF)
ROBERT E. DIXON and JUDITH E. DIXON
STEVEN N. DOLIN and MARY T. DOLIN
MARILYN T. DURBIN
KENNETH W. EBERLE and BETTY L. EBERLE
WILLIAM A. EDWARDS, JR. and
FRANCES M. EDWARDS
ANDRE YANN EGASSE (ESTATE OF)
J. ROY ELMS and ELIZABETH D. ELMS
NEALE M. ENSIGN and CHRISTINA H. ENSIGN
BEN H. FERGUSON
DEREK FERRIERA
MOREY B. FLEMING (ESTATE OF) and
DOROTHY R. FLEMING
WILLIAM J. FOLEY and SHIRLEY J. FOLEY
DOUGLAS H. FORD (ESTATE OF)
FRANK A. FOTI and ROSE A. FOTI
JUDITH ANN FRIEDMAN
W.C. FROELICH, INC.
CLIFFORD A. FROST and LORRAINE L. FROST
MOSES D. GARAY and ROSE GARAY
FRANK M. GARCIA and LOIS A. GARCIA (MOSS)
LAURA E. GARCIA
F.W. GASSER and ROSE GASSER
LOUIS GEORGE and ELIZABETH GEORGE
ANNA F. GERACI and SALVATORE GERACI
ERNEST O. GERMANN and VIRGINE M. GERMANN
WILLIAM L. GILL
KURT A. GRAF and NELLIE O. GRAF
ROBERT U. GRANT
ROGER DALE GRESHAN
G.E.M. DEVELOPMENT, INCORPORATED
DAN HAMMON (ESTATE OF) and
SHERRIE HAMMON (WEAVER)

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT – Continued

CHARLES S. HANSON, JR. and
VIRGINIA R. HANSON
WILSON L. HARRELL
DAN M. HAUSERMAN
WAYNE F. HESS and LORRAINE E. HESS
DOUGLAS J. HINDS and MARIAN O. HINDS
J.C. HINTON and LA VAUN E. HINTON
DONALD I. HITT
DONNA IVY
CARLTON S. JAMES
K.D. JEFFERSON and WINNIFRED A. JEFFERSON
EDWARD N. JELLINS (ESTATE OF) and
JANET L. JELLINS
RUDOLPH JOHNSON and PATRICIA JOHNSON
ARNE JORGENSON
VINCENT S. KEELE and TEDDYANNA P. KEELE
ROY KERTON and LADONNA KERTON
MIKLOS J. KISIDAY and VALIRIA E. KISIDAY
VIRGINIA J. KOTECKI
PETER LANGE
OLAF O. LARSON
CHARLES W. LEW
ROBERT E. LIVESAY and FRANCES M. LIVESAY
(ESTATE OF)
HENRY G. LOUIE and LOUIS LOUIE
IAN D. MACGREGOR
MELVIN J. MADDEN and RUTH L. MADDEN
MARIO A. MANDOLI and ALICE M. MANDOLI
ANTHONY JOHN MARAN
DAN H. MARSHALL
LEONARD MAYRISCH, JR.
EDWARD J. MCCARTHY
HALL B. MCELREE and GEORGETTA B. MCELREE
FRANK J. MERRITT and SHARON L. MERRITT
CHARLES S. MITCHELL

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT – Continued

ERNESTINE H. MOORE (ESTATE OF)
ANDREA C. MONIZ
ARTHUR L. MONTERO
HOWARD V. MORE
DEAN L. MORGAN
EMIL A. NECHVATAL (ESTATE OF) and
BERNICE M. NECHVATAL
CONSTANCE NOIA
STEPHEN J. NORRIS and JACQUELINE NORRIS
PETER PANOS and SOPHIA PANOS
EDDIE R. PEDERSEN and DORIS J. PEDERSEN
MERLIN A. PORTER and FERN K. PORTER
FRANK A. QUADROS and FRANCES M. QUADROS
WILLIAM R. RAMSEY and LINDA R. RAMSEY
RUDY REGALADO and JOSEPHINE M. REGALADO
(FOWLER)
ROBERT W. RIEB
QUENTIN H. RINK
GEORGE R. ROBINSON
ROCKY RIDGE
LARRY D. RUDY
EUGENE SAKAI and BETTY SAKAI
JOHN G. SANCHEZ (ESTATE OF) and
MARY M. SANCHEZ
E.S. SARRO (ESTATE OF) and ELEANOR M. SARRO
CHARLES OLIVER SASS
PATRICK N. SATALINO
DONALD E. SAUNDERS (ESTATE OF) and
GWEN SAUNDERS (ESTATE OF)
DAVID J. SHERDEN and SHARON L. SHERDEN
SEIJI SHIBA
BRUCE E. SIMKINS
J. ROCKWELL SMITH and PATRICIA SMITH
BERTRAM S. SOLOMON and SYLVIA M. SOLOMON
MARK THOMAS SPRAGGINS

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT – Continued

EDWARD K. STEARNS
FREDERICK A. STREIB and ROSEMARY STREIB
SUGARPINE INVESTMENTS, INC.
A.J. SULME
DONALD P. SWAN
TAHOE ALPINE PROPERTIES LTD.
WILLIAM E. THACKREY and
SYLVIAN E. THACKREY
LORENE THOMAS
LINDA A. THOMPSON and ALLAN J. THOMPSON
ROBERT E. TOLBERT and IRENE TOLBERT
FRANK W. TRABUCCO and MARY S. TRABUCCO
JAMES R. TREMBATH
DONALD PAUL TURNER and DORIS A. TURNER
NEALAND R. UNDERWOOD and
DELLA UNDERWOOD
ROBERT URSO
RICHARD G. VENTRESCO and
DARLEEN P. VENTRESCO
CAROLE A. WARD
WEST BAY ENTERPRISES
LAMBERT P. WILLE
ROBERT H. WILLIAMS (ESTATE OF)
WOODROW H. WILSON and BARBARA C. WILSON
JOHN A. WOLLMAN
ROBERT C. WORKS and PATRICIA W. WORKS
PETER I. YAMAMOTO (ESTATE OF) and
MIDORI M. YAMAMOTO
ENRIQUE J. ZOLLNER (ESTATE OF) and
P.F. ZOLLNER
THEODORE CAROL ZSUTTY and
ROSE MARIE ZSUTTY
VIRGINIA R. ZUCK
JEFFREY G. ZYBURA and LANA R. ZYBURA
RICHARD A. ALLISON

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT – Continued

ALPINE INVESTMENT CO., LTD.
AMCO, INC.
PETER J. ANDERSEN and JANET I. ANDERSEN
DONALD F. ARCHIBALD and
VICTORIA ARCHIBALD
JEAN L. ATHERTON
DAVID E. BAKER and MAXINE A. BAKER
JOHN H. BAKER
PIERINO C. BARENGO
JAMES E. BATEMAN and CHERYL J. BATEMAN
VINCENT A. BAUER and ALICE R. BAUER
JUNE F. BECKLER
DERRIL D. BERGT and PATRICIA M. BERGT
H.I. BIRR, III
LEROY G. BLACK and IDA B. BLACK
JEROME O. BLOMBERG
JOHN FRANKLIN BOYDSTON
LOUIS G. BRENNAN and CYNTHIA B. BRENNAN
ROBERT BRIDE
HARRIS J. BUCHBINDER
SAM CAMMI and LILLIAN A. CAMMI (ESTATE OF)
MAUREEN B. CASSIDY
CAVE ROCK ESTATES, A GENERAL PARTNERSHIP
WILLIAM M. CHARNEY
TERRY BRADLEY CLARKE
GEORGE B. CLIFFORD
WILLIAM G. COLLINS, JR. and
BEVERLY R. COLLINS
THOMAS F. COMBS
JAMES A. CONE and BEVERLY J. CONE
JOSEPH J. COOKE and HELGA COOKE (ROGHERS)
PATRICIA DEAL
ROBERT DEMELLO
JAMES J. DORST and BEVERLY ANN DORST
JOESPHINE A. DUDEK and MICHAEL N. DUDEK

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT – Continued

WIACZESLAW DUSS and VERNA DUSS
JAMES W. EHRENBURG and
PHYLLIS C. EHRENBURG
SARAH E. ERLACH
JAN J. ERTESZEK (ESTATE OF)
DONALD L. EVERINGHAM
GAYLE FISHER
MARIE G. GARLAND
HARRY F. GETZ (ESTATE OF) and BETTY J. GETZ
RUSSEL R. GOEBEL
THOMAS S. GOTO and HIDEKO GOTO
LYNN R. GRADY
BERT GRAFTON, JR. (ESTATE OF)
RICHARD L. GRAY (ESTATE OF) and FAYE L. GRAY
(ESTATE OF)
GREAT CALIFORNIA GRAY
RICHARD A. GRISWOLD and
MADELINE C. GRISWOLD
ROBERT V. HALE and MERLA J. HALE
WILLIAM L. HANE
JACK L. HARE and LAVINA L. HARE
KENNETH J. HARRINGTON
THOMAS A. HASLETT and STELLA M. HASLETT
WILLIAM J. HAVLEK and LEA M. HAVLEK
STEHEN J. HAYDEN and ANN HAYDEN
DENNIS L. HECKERSON
IRA W. HELGREN and CLAYTON E. HELGREN
ROBERT L. HELMS
LARRY D. HENRY
JAMES S. HETHERINGTON and
AUDREY O. HETHERINGTON
HAROLD ZANE HEWITT and RUTH B. HEWITT
THOMAS HILL
MALCOLM C. HODGE
RALPH W. INCE

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT – Continued

INCLINE LAKE CORPORATION
ROBERT MARSHALL JELDERKS
DANIEL E. JOHNSON and MARGARET R. JOHNSON
LLOYD O. JOHNSON
RAYMOND O. JOHNSON and CYNTHIA JOHNSON
LAWRENCE E. KATELHUT and
VANESSA ANNE KATELHUT
VINCENT S. KEELE and TEDDYANNA P. KEELE
GEORGE A. KELLNER
WILLIAM J. KELLY
DONALD B. KEOWN
PEARL S. KISHIMOTO
KEITH KLEIN
VALENTINE F. KLEIN and VALERIE A. KLEIN
POLLY W. KLINE
BARRY L. KRAUSS and JUDITH KRAUSS
ESTHER B. LANGHAM
LEWIS A. LARSEN and FERNE J. LARSEN
WALTER W. LATIMER and ULA E. LATIMER
JEFFREY C. LAUGHLIN and VIBEKE A. LAUGHLIN
CHELTON LEONARD and PETER C. LEONARD
DON LEONARD
BERNICE LINDBERG
RONALD E. LIPORI
JOSEPH A. LUNNY, JR. and JOAN M. LUNNY
PAULETTE L. LUTJENS, ET AL.
ALLAN D. LYNN
DUANE E. MACK (ESTATE OF)
GORDON MACLEAN
TERESA B. MALLEY (ESTATE OF)
STANLEY L. MARTIN (ESTATE OF) and
LOUISE A. MARTIN
J. MCBRIDE
SIMOS MICHAELIDES and VIRGINIA MICHAELIDES
ROBERTA W. MOHLER

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT – Continued

MERILYN MORRISON
LEON J. MOSS (ESTATE OF) and CAROL L. MOSS and DON E. MOSS and CARLENE L. MOSS (ESTATE OF)
KATHY MULLIGAN
SUE M. MYERS
PATRICIA NADING (THOMPSON) (ESTATE OF)
JOHN F. NASH and MARY G. NASH
HILMER C. NELSON and LOUISE K. NELSON (ESTATE OF)
MILTON NELSON (ESTATE OF) and CECELIA NELSON
DAVID O. NERGER and SHIRLEY R. NERGER
KENNETH R. NORTON (ESTATE OF)
MYRL A. NYGREN and MAE NYGREN
WILLIAM O'BRIEN and DINAH O'BRIEN
WILLIAM PAYNTER and LEE PAYNTER
SAM PERRY
NEIL W. PLATH and VIRGINIA H. PLATH
RICHARD D. PROVOST and ADELE K. PROVOST
EDWARD RAHE
VAUGHAN S. REAMS
DONALD W. ROSENDAHL and CAROLE L. ROSENDAHL
HORTENSE E. ROZMAN
THOMAS A. RUDY and ARLENE J. RUDY
NORMAN RUIZ and JULIE P. RUIZ
E. KENT SALAS and DOROTHY M. SALAS
LARAY SCHOUWEILER and E.F. SCHOUWEILER
RONALD C. SEIPEL and LUCRETIA E. SEIPEL
JACK SHELLY and CATHERINE SHELLY
BRYAN SHIEMAN and JOY L. SHIEMAN
FRANK C. SIMPSON
HAROLD F. SMILEY and BEULAH S. SMILEY (ESTATE OF)

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT – Continued

PHILIP E. SMITH
ALBERT B. SOLARI
ROGER C. STEELE
WILLIAM D. STEWART and DOROTHY J. STEWART
LEWIS THIGPEN
RAYMOND B. THOMPSON (ESTATE OF)
RODNEY J. THORSEN and ROBERTA J. THORSEN (OLENBERGER)
DAVID V. THRELKEL
WILLIAM F. TISDELL
COURTNEY TREMAINE and SHARON Y. TREMAINE
JAMES H. TREVOR
RICHARD M. VALERIOTE and POLLY P. VALERIOTE
LOUIS VARNESE and ANN MARIE VARNESE
JOHN W. VIGLIONE and MARCIA C. VIGLIONE
SAL VITALE and OLLIE A. VITALE
LUCILLE WAGNER (ESTATE OF)
EDMOND E. WARD and DOLORES A. WARD
THAD WILEY
JEAN WILTFONG
MARIAN H. WINGFIELD
JOHN A. WINN and ELLEN S. WINN
PETER W. WRIGHT and JUNE D. WRIGHT
DONALD E. ZWALD and SUZANNE ZWALD

To the extent that any of the foregoing are corporations, none has either parents or subsidiaries.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT – Continued

The Respondents are:

Tahoe Regional Planning Agency, a separate legal entity created pursuant to an interstate compact between the States of California and Nevada; the voting members of the governing body of the Tahoe Regional Planning Agency including TONY CLARK, CHESTER A. GIBBS, ALEXANDER HAAGEN, III, STAN HANSEN, THOMAS HSIEH, JAMES KING, ROBERT PRUETT, JAMES S. REED, LARRY SEVINSON, THOMAS STEWART, WILLIAM D. SWACKHAMER, PEGGY TWEDT, RONALD D. WESTERGARD and NORMAN C. WOODS; STATE OF CALIFORNIA; STATE OF NEVADA

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES xv

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS 4

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE WRIT 12

I WHEN THIS COURT DECIDED *FIRST ENGLISH*, AND HELD THAT A "TEMPORARY" PLANNING MORATORIUM COULD CONSTITUTIONALLY REQUIRE COMPENSATION, IT LEFT NO ROOM FOR LOWER COURTS TO HOLD TO THE CONTRARY 12

A *First English* and *Lucas* Plainly Require Compensation When a Land Use Regulation Prevents All Economically Beneficial or Productive Use For a Temporary Period of Time 14

B The Ninth Circuit's Holding – That a "Temporary" Planning Moratorium Can *Never* Constitutionally Require Compensation – Is Flatly Contrary to *First English* 15

C Aside From Its Conflicts With Decisions of *This* Court, the Ninth Circuit's Decision Conflicts With Decisions of Other Lower Courts, Creating Confusion That Requires This Court's Review to Resolve 21

TABLE OF CONTENTS – Continued

Page

II THE DECISION BELOW UNCONSTITUTIONALLY CONSCRIPTS PETITIONERS INTO PROVIDING PUBLIC OPEN SPACE TO BENEFIT THE PUBLIC WITHOUT COMPENSATION..... 23

III A ROLLING SERIES OF MORATORIA/USE PROHIBITIONS IS FUNCTIONALLY NO DIFFERENT THAN A SINGLE, BLANKET PROHIBITION. THE GOVERNMENT CANNOT EVADE ITS CONSTITUTIONAL OBLIGATION TO PAY COMPENSATION BY SLICING ITS REGULATION INTO BITE-SIZE PIECES 26

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

614 Company v. Minneapolis Community Dev. Agency, 547 N.W.2d 400 (Minn. App. 1996)..... 22

Agins v. City of Tiburon, 24 Cal.3d 266 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980) 21

Agins v. City of Tiburon, 447 U.S. 255 (1980) 19

Armstrong v. United States, 364 U.S. 40 (1960).. 7, 23, 25

Arverne Bay Construction Co. v. Thatcher, 278 N.Y.2d 222 (1938)..... 25

Barbaccia v. County of Santa Clara, 451 F. Supp. 260 (N.D. Cal. 1978) 28

Boston Chamber of Commerce v. Boston, 217 U.S. 189 (1910) 12

Chicago, R.I.&P.R. Co. v. United States, 284 U.S. 80 (1931) 25

City of Monterey v. Del Monte Dunes, 526 U.S. 687 (1999) 3, 4, 9, 19, 29

Creppel v. United States, 41 F.3d 627 (Fed. Cir. 1994) 24

Cumberland Farms, Inc. v. Town of Groton, 247 Conn. 196 (1998) 21

Dolan v. City of Tigard, 512 U.S. 374 (1994) 16, 19

Eastern Enterprises v. Apfel, 524 U.S. 498, 118 S.Ct. 2131 (1998)..... 25

Eberle v. Dane County Bd. of Adjustment, 227 Wis.2d 609 (1999)..... 22

First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Florida Rock Indus., Inc. v. United States, 18 F.3d 1560 (Fed. Cir. 1994) 24

Florida Rock Indus., Inc. v. United States, 45 Fed. Cl. 21 (Fed. Cl. 1999) 25

Gordon v. City of Warren, 579 F.2d 386 (6th Cir. 1978) 28

Griggs v. Allegheny County, 369 U.S. 84 (1962) 25

Hawaii Housing Auth. v. Midkiff, 467 U.S. 229 (1984) 14

Hurley v. Kincaid, 285 U.S. 95 (1932) 23

Kaiser Aetna v. United States, 444 U.S. 164 (1979) ...7, 24

Kimball Laundry Co. v. United States, 338 U.S. 1 (1949) 16

Lake Country Estates v. Tahoe Reg. Plan. Commn., 440 U.S. 391 (1979) 5

Landgate v. California Coastal Commn., 17 Cal.4th 1006 (1998) 22

Lockary v. Kayfetz, 587 F. Supp. 631 (N.D. Cal. 1984) 28

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 24

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 5, 7, 10, 14, 22, 28

Lucas v. South Carolina Coastal Council, 424 S.E.2d 484 (S.C. 1992) 15, 16, 22

Lynch v. Household Fin. Co., 405 U.S. 538 (1972) 12

MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986) 26, 28

TABLE OF AUTHORITIES – Continued

Page

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 22

Preseault v. I.C.C., 494 U.S. 1 (1990) 4

Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) 24

San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981) 20

Sintra, Inc. v. City of Seattle, 829 P.2d 765 (Wash. 1992) 22

Suitum v. Tahoe Reg. Plan. Agency, 520 U.S. 725 (1997) 3, 5, 29

Tabb Lakes, Ltd. v. United States, 10 F.3d 796 (Fed. Cir. 1993) 21

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 216 F.3d 764 (9th Cir. 2000) 1, 11

United States v. Dickinson, 331 U.S. 745 (1947) ... 26, 27, 28

United States v. General Motors Corp., 323 U.S. 373 (1945) 16

United States v. Security Indus. Bank, 459 U.S. 70 (1982) 24

Whitehead Oil Co. v. City of Lincoln, 515 N.W.2d 401 (Neb. 1994) 22

Whitney Benefits, Inc. v. United States, 926 F.2d 1169 (Fed. Cir. 1990) 24

Woodbury Place Partners v. City of Woodbury, 492 N.W.2d 258 (Minn. App. 1992) 22

TABLE OF AUTHORITIES – Continued

Page

STATUTES

28 U.S.C. § 1254 4

28 U.S.C. § 1292(b) 3

42 U.S.C. § 1983 ..... 4, 5

TEXTS

Branch, Melville, *The Sins of City Planners*, 42 Pub. Ad. Rev. 1 (1982) 19

Cobb, Rodney, *Land Use Law: Marred by Public Agency Abuse*, 3 Wash. U.J.L. & Policy 195 (2000) 19

Delogu, Orlando, *The Misuse of Land Use Control Powers Must End: Suggestions for Legislative and Judicial Responses*, 32 Me. L. Rev. 29 (1980) 19

Epstein, Richard, Takings: Private Property and the Power of Eminent Domain (1986) 27

Gallardo, Charles, "After 29 Years, Tiburon House Going Up: Home OK'd But Not For Original Owner," (Marin) Independent Journal, p. B-6, Oct. 21, 1997 19

Tribe, Laurence, American Constitutional Law (2d ed. 1988) 27

Walter, *Appraisal Methods and Regulatory Takings: New Directions For Appraisers, Judges, and Economists*, 63 Appraisal J. 331 (1995) 22

PETITION FOR WRIT OF CERTIORARI

Petitioners Tahoe-Sierra Preservation Council, Inc., *et al.*, respectfully pray that a Writ of Certiorari issue to review a final judgment and order of the United States Court of Appeals for the Ninth Circuit, and to resolve a clear conflict of decision between this Court and the Ninth Circuit, as well as the Ninth Circuit and other courts.

OPINIONS BELOW

The Ninth Circuit Court of Appeals' opinion was filed on June 15, 2000 and is reported as *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 216 F.3d 764 (9th Cir. 2000). (App., p. 1.)[1] The timely Petition for Rehearing was denied, along with the suggestion for Rehearing En Banc, on Oct. 20, 2000. Five active Circuit Judges dissented from the denial of Rehearing En Banc because the panel opinion is in direct conflict with an earlier decision of this Court. The Order and Dissent are published at 228 F.3d 998. (App., p. 156.)[2]

As the five dissenting Judges aptly summarized it:

> "The panel does not like the Supreme Court's Takings Clause jurisprudence very much, so it reverses *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), and adopts Justice Stevens' *First English* dissent." (App., p. 157; 228 F.3d at 999.)

---

[1] The Ninth Circuit's opinion affirmed the part of the judgment denying relief to the Petitioners and reversed the part of the judgment granting partial relief. The result of the appellate proceedings is to eliminate any relief to these 449 property owners *for two decades of total regulatory nullification of all economically viable use of their land.*

[2] Judge Kozinski authored the dissenting opinion, joined by Judges O'Scannlain, Trott, T.G. Nelson, and Kleinfeld.

The Jan. 15, 1999 decision of the District Court appears at 34 F.Supp.2d 1226 (D. Nev. 1999). (App., p. 57.) A related opinion dealing with another issue decided by this same appeal appears at 992 F. Supp. 1218 (D. Nev. 1998). (App., p. 128.)

This is the *fourth* decision rendered during the past decade by the Ninth Circuit in these protracted proceedings. The earlier ones (all bearing the same name as the case at bench) appear at: 911 F.2d 1331 (9th Cir. 1990), *cert denied*, 499 U.S. 943 (1991) (referred to in the record as *TSPC I*); 938 F.2d 153 (9th Cir. 1991) (*TSPC II*); and 34 F.3d 753 (9th Cir. 1994), *cert denied*, 514 U.S. 1036 (1995) (*TSPC III*). Some of these decided issues in favor of the Petitioners, but the panel below refused to enforce them. This is thus precisely the kind of major constitutional litigation with widespread implications that warrants closure by a definitive opinion from this Court to settle issues that have bedeviled courts and litigants for more than a decade, and that have caused dissention among appellate Judges.

JURISDICTION

Through a series of rolling moratoria/prohibitions on land development, the Tahoe Regional Planning Agency (TRPA) has kept the 449 individual Petitioners (referred to collectively by their organizational name, Tahoe-Sierra, or simply as the landowners) from making *any* use of their land since 1981,[3] while being required to pay taxes

[3] The Petitioners are all individuals. Their only relationship is that each of them owns a vacant residential lot near Lake Tahoe. These are not commercial developers; these are ordinary individuals who wanted only to build individual homes for their own use.

on their useless land.[4] Among other things, these landowners have been subjected to the same absolute prohibition on development in a "Stream Environment Zone" this Court examined in *Suitum v. Tahoe Reg. Plan. Agency*, 520 U.S. 725 (1997).

Tahoe-Sierra filed this suit in 1984 under the Civil Rights Act, 42 U.S.C. § 1983, seeking compensation for the taking of property effected by this total use prohibition. (Compare *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 [1999] [affirming compensation via § 1983 for a temporary regulatory taking].) After suffering through an agonizingly slow litigational process, the landowners saw their constitutional rights (and their faith in the judicial system) at least partially vindicated when the District Court held in 1999 – 15 years after suit was filed – that TRPA had indeed prevented them from making *any* economically productive use of their land from 1981 to 1984, resulting in a temporary taking of their property and requiring compensation under *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987).

Following the District Court's extensive findings of fact and its opinion finding TRPA liable for some of the landowners' damages, that court certified the liability issues for appeal (in lieu of holding an immediate valuation trial) and the Court of Appeals accepted them pursuant to 28 U.S.C. § 1292(b). The Ninth Circuit affirmed in part and reversed in part in such a way that all relief was denied. The only thing remaining on remand would be to formalize that death knell.

Though avoiding saying so directly, the Ninth Circuit refused to follow this Court's decision in *First English*. However, as demonstrated in Judge Kozinski's opinion

[4] When the suit was filed, there were nearly 700 plaintiffs. Over the decades, 55 of them passed away and others, exhausted by the litigation, dropped out. After 20 years, 449 continue to fight to protect their constitutional rights.

for the five dissenting Judges, the opinion not only disregarded this Court's holding but, instead, applied Justice Stevens' *dissent* in *First English*.[5] This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment, United States Constitution:

" . . . nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment, United States Constitution:

"Section 1 . . . nor shall any State deprive any person of life, liberty or property without due process of law; . . . "

42 U.S.C. § 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Pertinent portions of TRPA's ordinances and regulations are reproduced in the Appendix at p. 168.

---

[5] Neither of the other two dissenting Justices in *First English* concurred in this aspect of Justice Stevens' dissent. It may be worth noting that, when this Court reaffirmed and applied *First English* three years later, Justice Stevens followed *stare decisis* and joined the Court's unanimous opinion, rather than reiterate his dissenting views. (*Preseault v. I.C.C.*, 494 U.S. 1 [1990].) He did the same thing more recently in joining the Court's opinion in *Del Monte Dunes*. Apparently, a majority of the Ninth Circuit's active Judges still hews to a dated notion that is no longer endorsed even by its original author.

STATEMENT OF THE CASE

The Petitioners – owners of some 400 individual, lawfully subdivided, single-family residential lots around Lake Tahoe – are mostly married couples who bought their lots years ago to build individual retirement, vacation, or permanent homes for themselves and their families. The lots were all located in partially developed residential neighborhoods with paved roads and utility service. All of the landowners bought their lots many years before the regulations challenged here were even being considered. Their expectation to use their land the same as their neighbors was thus as real as it was reasonable. (Compare *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 [1992] [taking occurred when new regulations prevented buyer of last two undeveloped lots in a subdivision from building].)

However, for the past two decades Petitioners have been prevented from building their homes (or anything else) by a series of rolling prohibitions imposed by the Respondent Tahoe Regional Planning Agency. There were four formal prohibitions, interspersed with informal ones to bridge some gaps, the upshot of which has been a complete prohibition of any use since 1981.

This Court has some familiarity with both TRPA's history and one of the use prohibitions involved here (i.e., no building in a "Stream Environment Zone" [SEZ]) from its recent experience with *Suitum v. Tahoe Reg. Plan. Agency*, 520 U.S. 725 (1997).[6] The same absolute prohibition this Court saw for Mrs. Suitum's SEZ land has been true for the SEZ lands in this case, and for the rest of the

---

[6] For earlier litigation in which Justice Stevens wrote for a unanimous Court that TRPA is amenable to suit by landowners under 42 U.S.C. § 1983, see *Lake Country Estates v. Tahoe Reg. Plan. Commn.*, 440 U.S. 391 (1979).

land, too.[7] As the District Court found on ample evidence, the TRPA restrictions precluded all economically beneficial or productive use of the properties now before this Court. (App., p. 99.)[8]

Many have sung the environmental praises of Lake Tahoe;[9] none disputes its glories. It is evidently unique in the depth of its clarity – and therein lies both its blessing and its curse. Because of concerns that the lake's clarity was being degraded by algae being fed by nutrients washing into the lake from areas that were being developed, Congress (in 1969) approved a Compact between California and Nevada that created TRPA to control development around the lake. (App., p. 6.)

The Compact was amended in 1980 to strengthen TRPA's mandate. (App., p. 7.) Thereafter TRPA, evidently heedless of the distinction between regulation and confiscation, began its series of rolling moratoria/prohibitions that has precluded all economically productive use of each of the homesites owned by these 449 landowners ever since.

One thing needs to be clearly said at the outset. These landowners are not contesting TRPA's power to regulate, or even to prevent use of their land to the extent that is necessary to fulfill its mission. Rather, they are contesting only the constitutional legitimacy of TRPA's

---

[7] TRPA uses a system of 7 classes to categorize land in its jurisdiction. Classes 1, 2, 3, and SEZ are the most heavily regulated. Each of the parcels at issue here is in one of those classes.

[8] Although it reversed the District Court's legal conclusion that this absolute prohibition resulted in a temporary taking that required compensation, the Court of Appeals expressly left the trial court findings of fact – including this one – undisturbed. (App., p. 40, fn. 30.)

[9] See, e.g., App., pp. 59-60, referring *inter alia* to Mark Twain, President Clinton, and Vice President Gore.

attempt to preclude all productive use *without compensation*.[10] They seek only the compensation the Constitution promises when land regulation goes so far that it becomes a *de facto* taking for an obvious public use.[11] The factual scenario that follows needs to be read with that in mind.

Ordinance 81-5 (App., p. 168) was the first in the unremitting series of rolling prohibitions. Effective Aug. 24, 1981, it prohibited residential use – i.e., the use for which the properties were zoned and for which the landowners intended to use them – in parts of the Lake Tahoe Region involved in this litigation, i.e., lands in Classes 1, 2, 3, and SEZ. The moratorium was to remain in effect until TRPA adopted amendments to the Regional Plan. A year later, on Aug. 26, 1982, TRPA established environmental threshold carrying capacities which would determine the maximum capacity for development of each lot in the area. The Compact required TRPA to complete its work on the Regional Plan within one year of that date. As time passed, TRPA recognized it could not meet that goal, and so, a year later, on Aug. 26, 1983, it adopted Resolution 83-21 (a 90-day temporary moratorium) suspending all permitting activities pending completion of the new Regional Plan. (App., p. 170.)

The 90-day moratorium that rolled on through Resolution 83-21 was not enough, and TRPA informally

---

[10] This Court has frequently noted that the underlying substantive validity of governmental action is quite different from the constitutional mandate to pay compensation. See, e.g., *Kaiser Aetna v. United States*, 444 U.S. 164, 174 (1979), and other cases cited *post* at p. 24, fn. 26.

[11] See, e.g., *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, and other cases cited *post* at p. 25, fn. 27. The Tahoe Basin – i.e., TRPA's area of control – contains 501 square miles. The lake itself is 191 square miles. The burden of preservation is plainly a public one that cannot be thrust on the individual owners of a few hundred residentially zoned and subdivided lots. (Compare *Armstrong v. United States*, 364 U.S. 40, 49 [1960].)

allowed it to keep rolling from Nov. 26, 1983 until April 26, 1984, when it finally adopted its new Regional Plan. (App., p. 75.) The 1984 Plan (Ordinance 84-1; App., p. 172) made no change in the use prohibition inflicted on these landowners. Although it appeared to permit development *elsewhere* in the Tahoe Basin, all of the homesites in this litigation remained untouchable. The prohibition simply continued to roll indefinitely.

The State of California (TRPA's staunch ally and defender in this case) sued TRPA when the 1984 Plan was adopted because it felt the parts of the new plan dealing with *other landowners* did not comply with the restrictive/protective demands of the Compact. Shortly thereafter, Judge Garcia of the Eastern District of California enjoined TRPA from approving any building projects. That injunction remained in force until TRPA promulgated another revised Regional Plan in 1987. (App., p. 77.)

But the only effect of Judge Garcia's injunction was to prevent TRPA from allowing those *other* landowners, *not these Petitioners*, to develop their properties. Had there been no such injunction, the 1984 Plan would have precluded all development on Class 1, 2, 3, and SEZ lands anyway. The injunction thus had no impact on these landowners: it "prevented" TRPA from issuing permits to these people, who could not have obtained permits in any event for reasons unrelated to the injunction. In short, the prohibition on use of their properties that had started in 1981 continued on, unabated, through 1987.

And beyond. For these petitioning landowners, the impact of the 1987 Plan was to continue what had gone before. The use prohibitions that had previously been labeled "temporary" simply rolled on. Thus, under none of the various ordinances, resolutions, informal moratoria, or formal plans TRPA issued beginning in 1981, was there anything economically beneficial or productive that these landowners could do with any of their individual homesites. Through this series of rolling enactments, TRPA has effectively blocked construction of their homes for the past two decades and that prohibition has become

permanent. The only thing left for the landowners to do is to continue holding bare legal title to something that cannot be productively used or to sell it at bargain basement prices to entities established by the two states and the federal government for a salvage operation, while paying property taxes and bearing all other obligations of property ownership in the interim.[12]

Procedurally, this case has been a nightmare for the landowners. They have been in litigation for the better part of two decades and have nothing to show for it but the courts' "thinly disguised contempt" for their constitutional rights.[13]

They have been to the Ninth Circuit four times, and before the District Court on countless occasions.[14] In all those hearings, the lower courts refused to acknowledge the unified nature of TRPA's course of action that resulted in a continuous prohibition of all use from 1981 through the present. Thus, as shown by the grid prepared by the

---

[12] Because of the impact of TRPA's rolling use prohibitions, the majority of the landowners succumbed and sold their parcels for far less than fair market value to one of these scavenging agencies. The agencies paid only the bare residual value of unusable land. The Petitioners seek the difference so they may be made constitutionally whole, a result similar to the one upheld by this Court in *Del Monte Dunes*.

[13] *TSPC I*, 911 F.2d at 1346 (Kozinski, J., dissenting in part).

[14] This began as two separate suits, one filed in California and one in Nevada, pursuant to the venue provisions of the Compact. After separate District Court rulings resulted in separate Ninth Circuit opinions, the matters were consolidated in the Nevada District Court. A 1998 decision by that court noted that the case had "generated at least seven *published* opinions so far." (App., p. 129; 992 F. Supp. at 1219, fn. 1; emphasis, the court's.) Since then, there have been at least two more District Court opinions, one more Ninth Circuit opinion, and a dissent from the denial of *en banc* reconsideration, swelling the number of published opinions in this Dickensian litigation nightmare to eleven.

Ninth Circuit (App., p. 11), the lower courts sliced and diced TRPA's actions into four pieces and analyzed each piece as though the others did not exist. Slicing TRPA's use prohibitions like so much baloney, the District Court refused to consider the bulk of the time period during which all use was prohibited (1984 through the present) (App., pp. 107-108, 155) – and then the Ninth Circuit eliminated the earlier three years (App., p. 40).

The District Court awarded compensation for a temporary taking for 1981 through 1984, relying on this Court's holdings in *Lucas*, 505 U.S. 1003 for the proposition that a regulation that deprives a landowner of all economically beneficial or productive use is a compensable taking, and *First English*, 482 U.S. 304, for the proposition that a temporary taking during a planning moratorium requires compensation the same as a permanent taking. The District Court denied any compensation for the impact of the 1984 Plan, asserting that it was Judge Garcia's injunction that prevented permits from issuing, not the 1984 Plan. (App., p. 106.)[15] Finally, the District Court denied any relief from the 1987 continuation of the use prohibitions on these lots on the ground that the statute of limitations had run by the time the

[15] This, of course, ignored the indisputable fact that these landowners *could not have obtained permits with or without the injunction*, because the 1984 Plan forbade development on their lots. The injunction prevented TRPA from granting development permits to *other* landowners, not these. As Judge Noonan expressed it at the oral argument of *TSPC III*, "It seems to me this is like a situation where the culprit pushes a person off the top of a high-rise building, and while the body is falling, someone else reaches out a window and shoots a bullet into the falling body." The analogy is apt. By the time the injunction issued, the 1984 plan had already killed the ability of these landowners to use their land. The injunction merely maimed the corpse.

landowners amended their complaints to seek compensation for the effects of the 1987 event.[16]

The Ninth Circuit affirmed insofar as the District Court *denied* relief, and reversed the limited relief the District Court had *granted*. The Ninth Circuit simply refused to follow this Court's decision in *First English*, which held that a temporary planning moratorium could be a taking (albeit a temporary one) that requires compensation for the period when use is forbidden.[17] Although both *First English* and the case at bench involved temporary planning moratoria in effect for a finite period of years, the court asserted that it was "flatly incorrect" that *First English* had any impact here. (App., p. 29.) Then, viewing each period separately, the court held that each of the properties retained substantial value (because the life of property is theoretically infinite and there could be use left at the end of the moratorium) and therefore there could be no taking, even "assum[ing] *arguendo* [in light of the District Court's findings] that the moratorium prevented all development in the period during which it was in effect." (App., p. 34, fn. 20).

[16] This analysis can hold true only if the 1987 Plan is viewed as an entirely separate "event," rather than a continuation of the use prohibition that TRPA had enforced on these lots since 1981. It also required both the District Court and the Ninth Circuit to disregard an earlier Ninth Circuit panel's decision in *TSPC III* (on which both rehearing and certiorari had been denied) that TRPA was wrong on the one statute of limitations issue it pressed fervently and that it had waived the rest. Denial of an *en banc* rehearing deprived the rest of the Ninth Circuit of the opportunity to clear up this internal conflict on its own.

[17] The Ninth Circuit's holding also conflicts with its earlier decisions in *TSPC I* and *TSPC II*, holding that such a temporary taking *could* be found. Denial of an *en banc* rehearing also deprived the rest of the Ninth Circuit of the opportunity to clear up this internal conflict on its own.

Needless to say, the Ninth Circuit's bizarre analysis ignores the fact that, while the "life of the land" may be indefinite, the lives of its mortal human owners are not, and using this approach simply strips human owners of all they own and enjoy. As Justice Holmes put it, the Just Compensation Clause of the Constitution "deals with people, not with tracts of land." (*Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 [1910].) More recently, this Court reaffirmed this concept by stressing that "Property does not have rights. People have rights." (*Lynch v. Household Fin. Co.*, 405 U.S. 538, 552 [1972].)

The landowners' timely Petition for Rehearing and rehearing *en banc* were both denied. (App., p. 157.) Five active Circuit Judges dissented, in an opinion that demonstrates the Ninth Circuit's conflict with *First English*, *Lucas*, and other decisions. Their dissent concludes:

> "The panel's desire to ease local governance does not justify approving means that violate rights secured by the Fifth Amendment as authoritatively interpreted by the Supreme Court." (App., p. 167; 228 F.3d at 1003.)
>
> "By voting not to rehear, we have neglected our duty and passed the burden of correcting our mistake on to a higher authority." (App., p. 157; 228 F.3d at 999.)

REASONS FOR GRANTING THE WRIT

I

WHEN THIS COURT DECIDED *FIRST ENGLISH*, AND HELD THAT A "TEMPORARY" PLANNING MORATORIUM COULD CONSTITUTIONALLY REQUIRE COMPENSATION, IT LEFT NO ROOM FOR LOWER COURTS TO HOLD TO THE CONTRARY

As the five dissenters aptly put it below, the Ninth Circuit "does not like the Supreme Court's Takings Clause jurisprudence very much, so it reverses *First English*. . . . " (App., p. 157; 228 F.3d at 999.) Just so.

In *First English*, this Court examined a temporary planning moratorium that forbade all construction in a recently flooded area, that was in effect for 2½ years, and that was designed to give the County's planners time to determine what uses ought to be permitted and what conditions ought to be placed on construction in a flood hazard area. After the California courts dismissed the case without trial on their theory that – as a matter of law – such action could not be a compensable taking, this Court reversed. This Court concluded that "on these facts the California courts have decided the compensation question inconsistently with the requirements of the Fifth Amendment" (*First English*, 482 U.S. at 311), and that compensation *could* be required under those facts. Surely, the legal principles applied in *First English* would not have led to a different conclusion if the moratorium had consisted of successive monthly freezes, rather than the 2 1/2 year moratorium before the Court.

Here, TRPA enacted a series of moratoria/prohibitions that were longer than those in *First English*, and were designed to prevent all development while planners determined what uses ought to be permitted and under what conditions construction ought to take place. Examining two building prohibitions that were labeled "temporary," the Ninth Circuit concluded that temporary planning moratoria could never – as a matter of law – require compensation. (App., p. 40.) That court defied the *First English* holding.

Just as was done thirteen years ago with the California judiciary, it is time to inform federal Judges who sit in California that their view of compensation for temporary takings is "inconsistent with the requirements of the Fifth Amendment" as well. *First English*, whatever its detractors may say, was not an ideological decision. The six-Justice majority consisted of the Chief Justice along with Justices Brennan, White, Marshall, Powell, and Scalia, a group that spanned the Court's spectrum.

A

First English and *Lucas* Plainly Require Compensation When a Land Use Regulation Prevents All Economically Beneficial or Productive Use For a Temporary Period of Time

The landowners' position is straightforward, and is based primarily on two of this Court's decisions: *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987) and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). In *Lucas*, this Court held that a taking occurs when a land use regulation prevents all economically beneficial or productive use. In *First English*, this Court held that – for 5th Amendment purposes – there is *no difference* between a taking for a period of years (i.e., a temporary taking) and a permanent taking of all interests. Both cases bear similarities to this one, in that government agencies were seeking to delay or prevent development in order to advance environmental goals. This Court could not have been more clear that the Constitution protects against uncompensated takings of both kinds – even where the public use behind the regulation is environmental protection.[18]

Lucas involved South Carolina's effort to protect and preserve its shoreline. After all but two lots in an exclusive oceanfront residential subdivision had been built, a new law prevented any further construction. This Court held that the owner of the last two lots was entitled to compensation if the new law precluded all economically beneficial or productive use of his land. As long as the law prevented such use, nothing else mattered. The taking was termed "categorical." (505 U.S. at 1015.) On

[18] "Public use" is coterminous with the exercise of the regulatory police power. (*Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 240 [1984].)

remand, the South Carolina Supreme Court found a temporary taking as a matter of law and ordered compensation. (*Lucas v. South Carolina Coastal Council*, 424 S.E.2d 484 [S.C. 1992].)

First English involved a planning moratorium – the same as here. Following a flood, the county froze development while it studied the situation. After concluding that the remedy for any kind of taking was compensation (482 U.S. at 315), this Court addressed the question whether the length of time involved made any difference. The dissent thought it did. (482 U.S. at 322.) The majority disagreed:

> " . . . 'temporary' takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation." (482 U.S. at 318.)

Therefore, held the Court, even though such a holding will undoubtedly impinge on the freedom and flexibility of land use planners (482 U.S. at 321), "invalidation of the ordinance without payment of fair value for the use of the property during this period of time would be a constitutionally insufficient remedy" (482 U.S. at 322). Compensation for the lost use of the property while the moratorium held the land fallow was held constitutionally mandatory.

B

The Ninth Circuit's Holding – That a "Temporary" Planning Moratorium Can *Never* Constitutionally Require Compensation – Is Flatly Contrary to *First English*

The dissenters got it right: the Ninth Circuit doesn't like this Court's takings jurisprudence. Its decisions in this litigation have, bit by bit, undermined these landowners' case. In its first contact with this litigation, the

nominal dissenter in a strange three opinion decision[19] noted that the per curiam opinion appeared to harbor "thinly disguised contempt" for the landowners' plea that their Bill of Rights concerns be accorded the same respect as other Bill of Rights concerns (*TSPC I*, 911 F.2d at 1346).[20] In the final decision in the instant case, the panel went so far as to *de facto* "reverse" decisions of this Court in order to deny relief. But its latest decision simply goes too far in its effort to nullify *First English* and *Lucas*.

To rationalize its deviance from *First English*, the court below concocted a theory it called "conceptual severance" (adding insult to injury, the court said the landowners proposed that theory, when they never had), and concluded that such "severance" of different property interests (here, a taking for a period of years) could not legally be done, i.e., that unless it is a permanent deprivation, it *cannot* be a taking. (App., p. 33.) The short answer to that assertion is that it defies *First English*, where this Court concluded: "Nothing in the Just Compensation Clause suggests that 'takings' must be permanent and irrevocable." (482 U.S. at 318.) Moreover, government agencies routinely condemn various interests in land for temporary periods. (See *Kimball Laundry Co. v. United States*, 338 U.S. 1 [1949]; *United States v. General Motors*

---

[19] *TSPC I*, 911 F.2d 1331, was heard by Judges Fletcher, Reinhardt, and Kozinski. It contains a "Per Curiam" opinion [apparently by Judge Reinhardt, who also authored the opinion below], a "special concurrence" by Judge Fletcher, and a nominal "dissent" by Judge Kozinski, which the dissenter characterized as more of a "disagreement," given the fact that there were not two votes on the issue he disagreed with.

[20] It is more than merely noteworthy that this Court's opinion in *Dolan v. City of Tigard*, 512 U.S. 374 (1994) agreed with Judge Kozinski's analysis by concluding that the property rights protected by the 5th Amendment should not be treated as the "poor relations" of other Bill of Rights guarantees. (512 U.S. at 392.)

Corp., 323 U.S. 373 [1945].) Temporary easements are taken almost daily to facilitate road construction, but no one has ever suggested that the temporary nature of such takings somehow renders them noncompensable.

That the decision below conflicts with *First English* requires little more than comparing it with the *dissent* in *First English*. Although the opinion below never cites the *First English* dissent, it bears what Judge Kozinski called such "an uncanny resemblance" to that dissent (App., p. 160; 228 F.3d at 1000) that it caused him to suggest plagiarism (App., p. 162; 228 F.3d at 1001). Here is what the Ninth Circuit's opinion looks like when compared to the *First English* **dissent**:

First English **dissent**

> "Regulations are three dimensional; they have depth, width, and length. As for depth, regulations define the extent to which the owner may not use the property in question. With respect to width, regulations define the amount of property encompassed by the restrictions. Finally, and for purposes of this case, essentially, regulations set forth the duration of the restrictions. It is obvious that no one of these elements can be analyzed alone to evaluate the impact of a regulation, and hence to determine whether a taking has occurred. . . . [I]n assessing the economic effect of a regulation, one cannot conduct the inquiry without considering the duration of the restriction. . . . Why should there be a constitutional distinction between a permanent restriction that only reduces the economic value of the property by a fraction – perhaps one-third – and a restriction that merely postpones the development of a property for a fraction of its useful life – presumably far less than a third?" (482 U.S. at 330-332.)

"Property interests may have many different dimensions. For example, the dimensions of a property interest may include a physical dimension (which describes the size and shape of the property in question), a functional dimension (which describes the extent to which an owner may use or dispose of the property in question), and a temporal dimension (which describes the duration of the property interest). . . . A planning regulation that prevents the development of a parcel for a temporary period of time is conceptually no different than a land-use restriction that permanently denies all use on a discrete portion of property, or that permanently restricts a type of use across all of the parcel. Each of these three types of regulation will have an impact on the parcel's value. . . . There is no plausible basis on which to distinguish a similar diminution in value that results from temporary suspension of a development." (App., pp. 21, 26, 27.)

The reason the Ninth Circuit went to such lengths to immunize TRPA was that, from the start, the opinion was a goal in search of a justification. The opinion makes no bones about its desire to protect government planning agencies from the consequences of their own decisions. Calling land use planning in general "necessarily a complex, time-consuming undertaking," and the specific tool of a moratorium on development "crucial" to the process,[21] the Ninth Circuit announced that courts should be

---

[21] The landowners do not intend to disparage the task of planners in today's regulatory environment. But the complexity of their task is no justification for the excessive delays that frequently are multiples of the time it took this country to fight and win World War II. Moreover, there is simply no justification for protracted, multi-decade bureaucratic delays that have unfortunately become a staple of these cases. (E.g., *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 [1999] [5 years, 5 planning submissions, 19 site plans – all rejected; 18 years of litigation]; *Agins v. City of Tiburon*, 447 U.S. 255 [1980] [It took Mrs. Agins 30 years to finally receive permission to build four homes on her 5-acre parcel] [Charles Gallardo, "After 29 Years, Tiburon House Going Up: Home OK'd But Not For Original Owner," [Marin] Independent Journal, p. B-6, Oct. 21, 1997].)

As noted by knowledgeable commentators who are sympathetic to the regulators, such unfortunate behavior patterns have become common. See Rodney Cobb, *Land Use Law: Marred by Public Agency Abuse*, 3 Wash. U.J.L. & Policy 195 [2000]; Orlando Delogu, *The Misuse of Land Use Control Powers Must End: Suggestions for Legislative and Judicial Responses*, 32 Me. L. Rev. 29 (1980); Melville Branch, *The Sins of City Planners*, 42 Pub. Ad. Rev. 1 (1982).

"exceedingly reluctant" to rule in ways that would "threaten [the moratorium's] survival." (App., p. 28.) And so, instead of performing its historic role as the defender of the Bill of Rights, the court below chose to protect those impinging on the constitutional guarantee. It thought that providing constitutional protection here would provide property owners with a "weapon" to "penalize local communities for attempting to protect the public interest." (App., p. 40.)

That idiosyncratic Ninth Circuit notion goes far toward explaining the result below. It went beyond turning the 5th Amendment's protection of property rights into a "poor relation" of other constitutionally protected rights (see *Dolan*, 512 U.S. at 392); here, the court below declared such rights to be subservient to the wishes of constitutional violators. Takings litigation is not about "penalizing" anyone, any more than complying with the *Miranda* rule is about "penalizing" the community by making it easier for criminals to ply their trade with impunity. Nor when citizens demand enforcement of their Fourth Amendment rights are they wielding a

"weapon" with which to "penalize" the community for its effective law enforcement practices.

Takings litigation is only another instance of "protect[ing] the public interest" by requiring obedience to the Constitution. As Justice Brennan put it, "After all, if a policeman must know the Constitution, then why not a planner?" (*San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 661, fn. 26 [1981] [dissenting, but expressing the substantive views of five Justices].) Neither police officers nor planners are above the law, and requiring them to toe the constitutional mark does *not* "penalize the community." Quite the contrary: it is disregard of the Bill of Rights that penalizes the citizenry.

The Ninth Circuit's erroneous focus on defending all possible planning tools, in order to preserve the flexibility of planners is flatly contrary to *First English*, a conclusion easily drawn by comparing the opinion below with *First English*:

First English

"We realize that even our present holding will undoubtedly lessen to some extent the freedom and flexibility of land-use planners and governing bodies of municipal corporations when enacting land-use regulations. But such consequences necessarily flow from any decision upholding a claim of constitutional right; many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities, and the Just Compensation Clause of the Fifth Amendment is one of them." (482 U.S. at 321.)

Tahoe-Sierra IV

"In reaching this conclusion, we preserve the ability of local governments to do what they have done for many years – to engage in orderly, reasonable land-use planning through a

considered and deliberative process. To do otherwise would turn the Takings Clause into a weapon to be used indiscriminately to penalize local communities for attempting to protect the public interest." (App., p. 40.)[22]

C

Aside From Its Conflicts With Decisions of *This* Court, the Ninth Circuit's Decision Conflicts With Decisions of Other Lower Courts, Creating Confusion That Requires This Court's Review to Resolve

As if direct conflict with this Court's decisions were not enough, the opinion below conflicts with other lower court opinions as well. For example, in *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796, 800 (Fed. Cir. 1993), the court acknowledged that, under *First English*, "a taking, even for a day, without compensation is prohibited by the Constitution." Both that conclusion and the one below cannot coexist.

Other courts agree with *Tabb Lakes*. For example, in *Cumberland Farms, Inc. v. Town of Groton*, 247 Conn. 196 (1998), the town denied a variance. Notwithstanding that the property owners retained some use of the service station on their property, the Connecticut Supreme Court held that they could pursue compensation for a temporary taking of their property during the time that it took to litigate the invalidity of the town's denial. The court expressly noted that the town's argument was "contrary to the holding of *First English*. . . . " (247 Conn. at 196.)

---

[22] Ironically, it was *precisely* that reasoning of the California Supreme Court in *Agins v. City of Tiburon*, 24 Cal.3d 266, 276-277 [1979], *aff'd on other grounds* 447 U.S. 255 [1980], that this Court branded as an incorrect interpretation of the Fifth Amendment in *First English*, 482 U.S. at 317.

Moreover, to characterize a 20-year process of rolling prohibitions of all uses of the Petitioners' lands as "orderly" and "reasonable" does violence to the English language.

In *Eberle v. Dane County Bd. of Adjustment*, 227 Wis.2d 609 (1999), the county denied an access permit. The Wisconsin Supreme Court held that the owners could pursue compensation for a temporary taking, notwithstanding that they regained full use of their property when that court eventually overturned the permit denial. The court expressly concluded that the county's argument against compensation was contrary to both *First English* and *Lucas*. (227 Wis.2d at 633.)

Likewise, in *Whitehead Oil Co. v. City of Lincoln*, 515 N.W.2d 401 (Neb. 1994), the Nebraska Supreme Court rejected the city's argument that it should not be liable for a temporary taking because all use of the property had not been taken, by referring to "the line of cases which recognizes relief is possible from regulatory takings which do not deprive the owner of all economic use of the property." (515 N.W.2d at 407.) Finally, on remand from this Court's decision in *Lucas*, the South Carolina Supreme Court held that a temporary taking had occurred as a matter of law. (*Lucas v. South Carolina Coastal Council*, 424 S.E.2d 484 [1992].) This, in spite of the fact that Mr. Lucas could still "picnic, swim, camp in a tent, or live on the property in a movable trailer." (*Lucas*, 505 U.S. at 1044 [Blackmun, J., dissenting].)[23]

To the extent that some courts have been convinced to reach a different conclusion,[24] that only emphasizes the

---

[23] See also *Sintra, Inc. v. City of Seattle*, 829 P.2d 765, 774 (Wash. 1992) ("a temporary taking is compensable under the Fifth Amendment, and Sintra need not prove that the property remained unusable after the [regulation] was invalidated. [Citing *First English.*]"); *614 Company v. Minneapolis Community Dev. Agency*, 547 N.W.2d 400, 406-407 (Minn. App. 1996) (reduced occupancy of building sufficient to state claim for temporary taking where complaint alleged that remaining uses were not economically viable).

[24] E.g., *Woodbury Place Partners v. City of Woodbury*, 492 N.W.2d 258 (Minn. App. 1992). And, of course, California –

conflict of decision and deepens the need for this Court's intervention. There is a resolute need for clarity in this field which, to date, has been sorely lacking. As a matter of practical reality, all who deal with it are having difficulty. As a recent appraisal commentary summed it up, "there is almost universal consensus in the prodigious takings literature that takings theory is a 'muddle,' 'chaotic,' 'unsatisfactory,' 'unpredictable,' lacking in 'doctrine,' and a 'mess.' " (Walter, *Appraisal Methods and Regulatory Takings: New Directions For Appraisers, Judges, and Economists*, 63 Appraisal J. 331 [1995].) There is no reason to add to that litany, and every reason to rectify it.

II

THE DECISION BELOW UNCONSTITUTIONALLY CONSCRIPTS PETITIONERS INTO PROVIDING PUBLIC OPEN SPACE TO BENEFIT THE PUBLIC WITHOUT COMPENSATION.

In its classic regulatory taking decision, this Court held that "if regulation goes too far it will be recognized as a taking." (*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 [1922] [Holmes, J.].) The question of how "far" is "too far" remains unclear. This case provides the opportunity to clarify the standard significantly.

One guidepost is the precept that the cost of projects benefiting the public should be widely shared:

> "the Fifth Amendment's guarantee that private property shall not be taken for public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice,

---

always at the outer edge – believes that litigation to overturn an unconstitutional regulation is merely part of the "normal planning process." (*Landgate v. California Coastal Commn.*, 17 Cal.4th 1006 [1998].) Maybe there. The Wisconsin Supreme Court expressly refused to follow *Landgate* because it conflicts with *First English*. (*Eberle*, 227 Wis.2d at 632, fn. 25.)

should be borne by the public as a whole." (*Armstrong v. United States*, 364 U.S. 40, 49 [1960].)

TRPA has been absolutely clear throughout this process that it forbade the development of the residential homesites bought by these Petitioners in order to gain public benefits. And no one questions that doing so is a proper public goal. Suits such as this one assume that the regulation is for a permissible purpose.[25] This litigation doesn't seek to frustrate the regulation, but only to provide a remedy for its confiscatory impact. This has been the law at least since *Hurley v. Kincaid*, 285 U.S. 95, 103 (1932).[26] The Fifth Amendment:

> "is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." (*First English*, 482 U.S. at 315; emphasis, the Court's.)[27]

---

[25] For example, the Federal Circuit Court of Appeals (which reviews virtually all takings judgments against the Federal Government) has consistently affirmed judgments making the United States liable for takings that precluded development in order to further proper environmental goals. E.g., *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169 (Fed. Cir. 1990) (surface coal mining); *Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994) (limestone mining); *Creppel v. United States*, 41 F.3d 627 (Fed. Cir. 1994) (dredging and filling wetlands).

[26] This Court has consistently so held, in widely varying contexts. E.g., *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984) (trade secrets); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425 (1982) (cable TV access); *Kaiser Aetna v. United States*, 444 U.S. 164, 174 (1979) (access to navigable water); *United States v. Security Indus. Bank*, 459 U.S. 70, 75 (1982) (retroactive bankruptcy legislation).

[27] As Justice Breyer expressed it recently, "at the heart of the [Just Compensation] Clause lies a concern, not with preventing arbitrary or unfair government action, but with providing *compensation* for legitimate government action that takes 'private property' to serve the 'public good.' " (*Eastern Enterprises v. Apfel*, 524 U.S. 498, 118 S.Ct. 2131, 2161 [1998] [emphasis in original] [dissenting opinion].) See also *Florida Rock Indus., Inc. v. United States*, 45 Fed. Cl. 21, 24-25 (Fed. Cl. 1999).

TRPA's avowed pursuit of a "free lunch," its goal of creating an open space preserve around Lake Tahoe – but at someone else's expense – is precisely the kind of thing the *Armstrong* principle was designed to deal with. Denying all private use of the subject properties for the public use of enhancing the quality and recreational utility of Lake Tahoe is, on principle, no different than the government's desire to acquire safety zones around airports or approaches to highway bridges. (See *Griggs v. Allegheny County*, 369 U.S. 84, 89-90 [1962].) But either way, the acquisition of such control over *all* use of land adjoining a public facility – whether a lake or an airport – is a *de facto* taking that requires compensation.

The long and the short of it is that TRPA has taken all reasonable, economically productive use of Petitioners' home sites for a public "clear zone" around Lake Tahoe. Just compensation is constitutionally called for. It is irrelevant that TRPA's method was to strip away the use, while leaving title in the Petitioners. As this Court noted generations ago, "[c]onfiscation may result from a taking of the use of property without compensation quite as well as from the taking of the title." (*Chicago, R.I.&P.R. Co. v. United States*, 284 U.S. 80, 96 [1931].) In the words of the New York Court of Appeals, "[t]he only substantial difference . . . between restriction [of all use] and actual taking, is that the restriction leaves the owner subject to the burden of payment of taxation, while outright confiscation would relieve him of that burden." (*Arverne Bay Construction Co. v. Thatcher*, 278 N.Y.2d 222, 232 [1938].)

III

A ROLLING SERIES OF MORATORIA/USE PROHIBITIONS IS FUNCTIONALLY NO DIFFERENT THAN A SINGLE, BLANKET PROHIBITION. THE GOVERNMENT CANNOT EVADE ITS CONSTITUTIONAL OBLIGATION TO PAY COMPENSATION BY SLICING ITS REGULATION INTO BITE-SIZE PIECES

TRPA embarked on a program to deny the landowners all use of their homesites in 1981 and never wavered from that course. Throughout this litigation, they have charged that the totality of TRPA's actions extinguished their ability to build homes on their lots and that compensation was constitutionally mandated. But the courts below treated each of TRPA's acts in isolation from each of the others, as if each had only its own separate existence. In that way, the Ninth Circuit was able to isolate and minimize the impact of each component, and thereby attenuate the overall regulatory scheme.

Nothing in this Court's takings jurisprudence required the Ninth Circuit to use such sliced baloney tactics in examining TRPA's actions. Quite the contrary. When faced with circumstances involving a continuing governmental course of conduct where examination of the entire pattern of conduct was necessary to make a proper constitutional analysis, this Court has opted to examine the conduct as a whole. "A property owner is of course not required to resort to piecemeal litigation or otherwise unfair procedures. . . . " (*MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 350, fn. 7 [1986].)

In *United States v. Dickinson*, 331 U.S. 745 (1947), the government asked this Court to find that a taking occurred at the earliest possible event impairing the property owners' rights (so that the statute of limitations would have run by the time they filed suit). This Court refused the gambit, opting for a practical reading of the just compensation guarantee:

"The Constitution is intended to preserve practical and substantial rights, not to maintain theories. . . . The Fifth Amendment expresses a principle of fairness and not a technical rule of procedure enshrining old or new niceties regarding 'causes of action' – when they are born, whether they proliferate, and when they die. . . . The source of the entire claim – the overflow due to rises in the level of the river – is not a single event; it is continuous. And as there is nothing in reason, so there is nothing in legal doctrine, to preclude the law from meeting such a process by postponing suit until the situation becomes stabilized. . . . When dealing with a problem which arises under such diverse circumstances procedural rigidities should be avoided." (*Dickinson*, 331 U.S. at 748-749; citations and internal quotation marks omitted.)[28]

---

[28] That *Dickinson* was a physical taking case and the case at bench is a regulatory taking case is irrelevant. This Court has made no such distinction. Rather, in *First English*, the Court showed how all of the law of eminent domain works together – in all its facets, whether direct condemnation or physical or regulatory inverse condemnation, whether permanent or temporary – so that elemental doctrinal features apply across the board. Thus, in its analysis of a temporary regulatory taking, this Court relied on permanent physical inverse condemnation cases (482 U.S. at 316-317), temporary direct condemnation cases (482 U.S. at 318), and cases dealing with the fundamental powers of different branches of government to control the duties entrusted to them by the Constitution (482 U.S. at 319-321). Moreover, constitutional scholars with views as disparate as Professors Richard Epstein and Laurence Tribe agree that the key to finding a taking is the impact of the governmental action on the landowner, not the means by which the injury is inflicted. Compare Richard Epstein, Takings: Private Property and the Power of Eminent Domain 94 (1986) with Laurence Tribe, American Constitutional Law § 9-3 at 593 (2d ed. 1988).

The stabilization concept employed by this Court in *Dickinson* is akin to the concept of a continuing wrong that has been applied in other regulatory taking cases. (E.g., *Gordon v. City of Warren*, 579 F.2d 386, 391 [6th Cir. 1978]; *Lockary v. Kayfetz*, 587 F. Supp. 631, 635-636 [N.D. Cal. 1984], *aff'd* 917 F.2d 1150 [9th Cir. 1990]; *Barbaccia v. County of Santa Clara*, 451 F. Supp. 260, 266 [N.D. Cal. 1978].)[29] The theory of those cases is that, as long as the regulating entity continues to act in furtherance of its policy and goal, then the entity's actions are continuing and the statute of limitations will not run until the last act has become history.

Here, of course, there is no question that TRPA continued to act. It enacted its first use prohibition in 1981, another in 1983, another in 1984, and another in 1987. Each of those acts was but a part of the larger scheme. It should have been evaluated that way below. Otherwise, regulators could routinely evade this Court's decisions in *First English* and *Lucas* by the simple expedient of enacting serial regulations. That cannot have been this Court's intent in *MacDonald, Sommer & Frates*, when it disapproved of forcing property owners into "piecemeal litigation." By so ruling, the Ninth Circuit not only sealed the constitutional injury done by TRPA, it created conflict with each of these other opinions.

Moreover, the decision below erred prejudicially when it decided to immunize TRPA from the destructive effects of its 1984 Plan because the plan was so defective *in other respects* that a District Court enjoined the issuance of permits. Two things are clear, and either should have been enough to impose liability on TRPA for the three years the 1984 Plan's impacts precluded all development.

---

[29] All three cases relied on *Dickinson* as support for their holdings.

First, TRPA would not have issued permits to these landowners to build their homes under the 1984 Plan regardless of the presence or absence of an injunction. Under the 1984 Plan, these home sites *could not* be built on. Thus, regardless of the District Court's action, TRPA's own action precluded productive use of these parcels. Second, TRPA's 1984 Plan was the driving force that set it all in motion. But for TRPA's Plan, there would have been no injunction. As the instigator in a series of actions, TRPA's 1984 Plan was a substantial factor causing the landowners' injuries.

As this Court recently concluded, section 1983 actions like this one are tort actions, more specifically, constitutional tort actions. (*Del Monte Dunes*, 526 U.S. at 709.) Under settled tort precepts of causation, the 1984 Plan was a cause of the injunction that prevented TRPA from issuing permits. The landowners, of course, believe the Court need not go that far because the 1984 Plan itself permitted no development on their land. By itself, that is enough for liability.

The same is true of the 1987 Plan. It is merely a continuation of the rest. This Court has already acknowledged that no use of SEZ land was permitted under the 1987 Plan. (*Suitum*, 520 U.S. at 739.) The same, as the courts below acknowledged, is true for the rest of the homesites in this case.

When a continuous course of conduct causes constitutional harm, the instigator of that conduct is constitutionally liable for the harm caused. All of the harm.

CONCLUSION

The Petitioners are ordinary people who, acting in a lawful and constructive manner, have invested their substance and, in some cases, their lives' savings in pursuit of the "American dream" of homeownership. Now, however, they have been told that they cannot build their homes nor use their land for any economically rational

purpose, even as they must pay their property taxes and bear the burdens, duties, and liabilities of land ownership. Their only "right," they are now told, is to suffer foreclosure of their properties, or to sell them at bargain-basement prices to government agencies. The Ninth Circuit has thus held – in plain defiance of this Court's directly on-point holding in *First English* – that the constitutional promise of just compensation is a cruel hoax. To put it in scriptural terms, the Petitioners asked for bread, but the Ninth Circuit gave them stone.

The Petitioners are not some sort of enemy to be mocked with judicial displays of "thinly disguised contempt." They are Americans protected by the Bill of Rights. They have been abused by TRPA and ill-used by the Ninth Circuit. If property rights are not to be a constitutional "poor relation," the Petitioners deserve help from this court, and so does the confusing and contradictory law said to govern this unfortunate field. Perhaps more important, so does the integrity and precedential worth of this Court's *First English* holding.

The Petitioners pray that Certiorari be granted.

Respectfully submitted,

MICHAEL M. BERGER*
GIDEON KANNER
BERGER & NORTON
and
LAWRENCE L. HOFFMAN
HOFFMAN LAW OFFICES

Counsel for Petitioners
**Counsel of Record*

TAHOE-SIERRA PRESERVATION COUNCIL, INC.; Richard A. Allison; Alpine Investment Company, Ltd.; AMCO, Inc.; Jeffrey B. Andersen; Beth C. Andersen; Peter J. Andersen; Janet I. Andersen; Donald F. Archibald; Jean L. Atherton; David E. Baker; Maxine A. Baker; John H. Baker; Pierino C. Barengo, et al., Plaintiff-Appellee-Cross-Appellant,

v.

TAHOE REGIONAL PLANNING AGENCY, a separate legal entity created pursuant to an interstate compact between the States of California and Nevada; the voting members of the governing body of the Tahoe Regional Planning Agency including Tony Clark, Chester A. Gibbs, Alexander Haagen, III, Stan Hansen, Thomas Hsieh, James King, Robert Pruett, James S. Reed, Larry Sevinson, Thomas Stewart, William D. Swackhamer, Peggy Twedt, Ronald D. Westergard and Norman C. Woods; State of California; State of Nevada, Defendant-Appellant-Cross-Appellee.

Nos. 99-15641, 99-15771.

United States Court of Appeals,
Ninth Circuit

Argued and Submitted March 16, 2000
Filed June 15, 2000

E. Clement Shute, Jr. & Ellison Folk, Shute, Mihaly & Weinberger, San Francisco, California, for the defendant-appellant-cross-appellee.

Bill Lockyer, Attorney General of State of California, Richard M. Frank, Chief Assistant Attorney General, J. Matthew Rodriquez, Senior Assistant Attorney General, Daniel L.Siegel, Supervising Deputy Attorney General,

Mary J. Scoonover, Deputy Attorney General, Sacramento, CA, for the defendant-appellant-cross-appellee State of California.

Frankie Sue Del Papa, Attorney General of State of Nevada, William J. Frey, Deputy Attorney General, Carson City, NV, for the defendant-appellant-cross-appellee State of Nevada.

Lawrence L. Hoffman, Hoffman Law Offices, Tahoe City, California, for the plaintiff-appellee-cross-appellant.

Rochelle Nason, League to Save Lake Tahoe, South Lake Tahoe, California, John D. Echeverria, Environmental Policy Project, Georgetown University Law Center, and Thomas E. Roberts, Wake Forest University School of Law, for amici curiae American Planning Association and League to Save Lake Tahoe.

Karl Manheim, Loyola Law School, Los Angeles, California, and Stephen Shane Stark & Alan L. Seltzer, County of Santa Barbara, California, for amici curiae California Cities and California State Association of Counties.

Timothy J. Dowling, Community Rights Counsel, Washington, DC, for amici curiae International Municipal Lawyers Association.

Daniel P. Selmi, Los Angeles, California, for amici curiae Scientists.

Hardy Myers, Attorney General of Oregon, Michael D. Reynolds, Solicitor General of Oregon, and David F. Coursen, Assistant Attorney General of Oregon, Salem, Oregon, for amici curiae States of Oregon, Washington, Arizona, and Montana.

Lois J. Schiffer, Assistant Attorney General, and William Lazarus, David C. Shilton, and Peter H. Oppenheimer, United States Department of Justice, Washington, DC, for amici curiae United States.

Appeals from the United States District Court for the District of Nevada. Edward C. Reed, Jr., District Judge, Presiding; D.C. No. CV-84-00257-ECR.

Before: POLITZ*, REINHARDT, and HAWKINS, Circuit Judges.

REINHARDT, Circuit Judge:

This case involves approximately 450 plaintiffs who own property in the Lake Tahoe Basin. The lead plaintiff, Tahoe-Sierra Preservation Council, Inc. (TSPC), is an association of Tahoe-area property owners. Each individual property owner has alleged, *inter alia*, that each of several land-use regulations enacted in the 1980's by the Tahoe Regional Planning Agency (TRPA) constituted a "taking" of his property under the Fifth and Fourteenth Amendments. The principal question on this appeal is whether a temporary planning moratorium, enacted by TRPA to halt development while a new regional land-use plan was being devised, effected a taking of each plaintiff's property under the standard set forth in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). In addition, we must determine whether any taking that may have occurred following TRPA's adoption of a regional land-use plan in 1984

---

* The Honorable Henry A. Politz, Senior United States Circuit Judge for the Fifth Circuit Court of Appeals, sitting by designation.

was attributable to the promulgation of that plan, in light of the fact that the plan was enjoined immediately after it was enacted and was never implemented. Finally, we must decide whether the plaintiffs' claims regarding the successor regional land-use plan enacted by TRPA in 1987 – which did become effective – are time-barred.

FACTUAL BACKGROUND

Lake Tahoe is a large alpine lake located in the northern Sierra Nevada mountains. The lake is unique, both aesthetically and ecologically, because of its size, depth, and the astounding clarity of its water. Indeed, it is one of the clearest large lakes in the world. The unusual clarity of Lake Tahoe results from the fact that it historically was "oligotrophic" – that is, very low in nutrients and lacking a steep temperature gradient that would prevent deep circulation and mixing. Since mid-century, however, the lake has been undergoing "eutrophication," a process by which the nutrient loading in the lake increases dramatically, due to nitrogen and phosphorus (contained in soil) being washed into the lake. The excessive enrichment of the lake by these nutrients encourages the growth of algae. As algal growth in the lake increases, the lake loses its clarity and color, becoming green and opaque. In addition to destroying the water's visual perfection, the algae also depletes its oxygen content, thereby jeopardizing the survival of fish and other lake-dwelling animal life. In short, the eutrophication of the lake is causing serious, and effectively permanent, environmental damage.

The dramatic increase in Lake Tahoe's nutrient levels has been caused by the rapid development of environmentally sensitive land in the Lake Tahoe Basin. The land in the basin drains into the lake, and artificial disturbances of the land – the destruction of vegetation, the creation of impervious objects such as roads and houses, etc. – greatly increase the flow of nutrients into the lake.[1] Of course, the degree to which the development of a particular parcel of land in the basin increases the nutrient flow into the lake depends on the particular characteristics of that property. In general, the development of steeper land leads to more environmental damage, because steeper land is susceptible to more rapid soil erosion. Along with steepness, other land characteristics also affect the amount of damage caused to the lake by development. For example, certain areas near streams and other wetlands, known as Stream Environment Zones (SEZs), act as filters for much of the nutrient loading that runoff carries. Disturbance of SEZ lands can lead to the rapid release of these stored nutrients into the lake. In addition, disturbance of SEZ lands may prevent them from performing their natural filtering function, thereby permitting more of the nutrients contained in runoff from higher elevations to reach the lake. Accordingly, SEZ

---

[1] The destruction of vegetation increases the transport of nutrients to the lake in part because vegetation prevents soil erosion. Similarly, the construction of impervious surfaces increases the flow of nutrients to the lake in part because such surfaces prevent rain and snowmelt from seeping into the ground. This increases the surface flow of water, which hastens erosion.

lands are considered especially sensitive to the impact of development.

In an effort to halt the increasing rate of environmental damage to Lake Tahoe, the bi-state Tahoe Regional Planning Compact was approved in 1969 by the United States Congress after being passed by the legislatures of both Nevada and California. The Compact created the Tahoe Regional Planning Agency and set goals for the preservation of the lake and the surrounding basin. Pursuant to the Compact, TRPA adopted land-use Ordinance No. 4, which, among other things, classified the land in the basin according to its susceptibility to environmental damage. Land in the Lake Tahoe Basin was divided into seven "land capability districts," numbered 1 through 7, with 1 being the most environmentally sensitive and 7 the least. Land capability districts 1 through 3 – consisting of the steepest land in the basin – were denominated "high hazard" or "sensitive" lands. SEZ lands were classified as a special subcategory of high hazard lands and were labeled "1b" lands. Land capability districts 4 through 7 were referred to as "low hazard" or "non-sensitive" lands.

For each land classification, Ordinance No. 4 adopted recommendations as to what degree of artificial disturbance the land could safely sustain. There were numerous exceptions to the recommendations, however, and these exceptions caused significant dissatisfaction with TRPA's regulatory scheme. This dissatisfaction, combined with evidence that the 1969 Compact was not strong enough to remedy the problems causing the decline in the basin environment, led to the amendment of the Tahoe

Regional Planning Compact in 1980.[2] In addition to restructuring TRPA and its voting procedures, the 1980 Compact directed TRPA (1) to adopt "environmental threshold carrying capacities" within eighteen months of the date on which the Compact became effective;[3] (2) to adopt a new regional plan within twelve months of the adoption of the carrying capacities; and (3) to review all projects and establish temporary restrictions on development in the basin pending the enactment of a new regional plan.

To comply with the Compact's requirement that it temporarily restrict development pending the enactment of a new regional plan, TRPA enacted Ordinance 81-5, which became effective on August 24, 1981. Among other things, the ordinance temporarily prohibited most residential and all commercial construction on both Class 1-3 and SEZ lands. The ordinance did contain some exceptions to the development moratorium, however, which permitted TRPA to approve construction of some single family homes on Class 1, 2, and 3 lots on the Nevada side of the basin. The ordinance stated that the provisions setting forth the moratorium "shall expire upon the adoption by the agency of Amendments to the Regional Plan."

---

[2] The amended Compact took effect on December 19, 1980.

[3] The 1980 Compact defines "environmental threshold carrying capacity" as "an environmental standard necessary to maintain a significant scenic, recreational, educational, scientific or natural value of the region or to maintain public health and safety in the region. Such standards shall include but not be limited to standards for air quality, water quality, soil quality, soil conservation, vegetation preservation and noise."Art. II(i), 94 Stat. 3235.

On August 26, 1982, TRPA adopted environmental threshold carrying capacities. The agency then proceeded with the development of a new regional plan. Due to the tremendous complexity of the task, however, it soon became clear that TRPA would be unable to adopt a new regional plan within twelve months of the adoption of the carrying capacities, as required by the Compact. Concerned that it lacked the authority to issue any building permits after this date without a new regional plan in place, TRPA adopted Resolution 83-21. The Resolution suspended all permitting activities "pending adoption of the new regional plan." This suspension temporarily prohibited the development of all of the covered land. Although the Resolution was drafted to expire after a ninety-day period that ended on November 26, 1983, it was extended, in accordance with its design, until the new regional plan was adopted.

On April 26, 1984, thirty-two months after it had initially suspended development, TRPA adopted a new land-use plan, the 1984 Regional Plan. *See* Ordinance 84-1. On the day of its adoption, the State of California sued TRPA to block the implementation of the plan on the ground that it failed to establish land-use controls sufficiently stringent to protect the Lake Tahoe Basin. The next day, the League to Save Lake Tahoe followed suit and sought an injunction against the plan on the same grounds. The United States District Court for the Eastern District of California, Judge Edward J. Garcia presiding, immediately issued a temporary restraining order prohibiting TRPA from taking any action to approve building projects, and ordered TRPA to show cause why a preliminary injunction should not issue. On June 15, 1984, Judge

Garcia granted a preliminary injunction. We upheld the preliminary injunction on appeal, *see California ex rel. Van de Kamp v. Tahoe Reg'l Planning Agency*, 766 F.2d 1308 (9th Cir.1985), and the injunction remained in force until a completely revised land-use plan – the 1987 Regional Plan – was adopted.

PROCEDURAL HISTORY

After TRPA adopted the 1984 Plan, property owners in Nevada and California filed separate lawsuits. Plaintiffs owning property on the Nevada side of the Tahoe Basin filed an action in the United States District Court for the District of Nevada, and plaintiffs owning property on the California side of the basin filed one in the United States District Court for the Eastern District of California. All of the plaintiffs sought declaratory and injunctive relief, as well as damages, for various violations of the Takings Clause, the Due Process Clause, the Equal Protection Clause, and the Contracts Clause. *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 911 F.2d 1331, 1333-34 (9th Cir.1990) (*"TSPC I"*) (Nevada-side suit) (describing the claims in detail); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 938 F.2d 153, 154 n. 1 (9th Cir.1991) (*"TSPC II"*) (California-side suit) (same).

For purposes of litigation, the plaintiffs were divided into two groups: the first was composed of those who own land in areas classified as SEZs, and the second of those who own land in Class 1, 2, and 3 areas. In addition to the land-classification division, the plaintiffs' claims were divided into four time periods: Period I covers

August 24, 1981, to August 26, 1983, the time during which Ordinance 81-5 was in effect; Period II covers August 27, 1983, to April 25, 1984, the time during which Resolution 83-21 was in operation; Period III covers April 26, 1984, to July 1, 1987, the period that ran from the enactment of the 1984 Plan to the enactment of the 1987 Plan; and Period IV covers July 2, 1987, to the present, the time during which the 1987 Plan has been in effect.[4]

The procedural history of the California and Nevada actions, which involves three previous Ninth Circuit opinions, *see TSPC I*, 911 F.2d at 1331; *TSPC II*, 938 F.2d at 153; *Tahoe Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 34 F.3d 753 (9th Cir.1994) ("*TSPC III*"), and several district court opinions, need not be repeated in full. We review here only the three pieces of information regarding the procedural history that are necessary for our resolution of the present appeal.

First, it is important to point out that, at this stage in the litigation, the only claims of the plaintiffs that remain at issue are some of the § 1983 takings claims. The remainder of the claims were dismissed at one point or another. The following table shows the § 1983 takings claims that are before us (the claims are represented by X's):

---

[4] Obviously, the plaintiffs' initial complaints, filed in 1984, did not include claims regarding the 1987 Regional Plan. Following remand from *TSPC I* and *TSPC II*, however, the plaintiffs in both actions were permitted to amend their complaints. In their amended complaints, the plaintiffs added claims regarding the 1987 Regional Plan.

		Period I	Period II	Period III	Period IV
Nevada plaintiffs	Class 1-3 plaintiffs		X		X
	SEZ plaintiffs	X[5]	X		X
California plaintiffs	Class 1-3 plaintiffs	X[6]	X	X[7]	X
	SEZ plaintiffs	X	X	X	X

[5] In *TSPC I*, a panel of this court affirmed the dismissal of the Nevada-side, Class 1-3 plaintiffs' Period I claims, concluding that the claims were unripe because the plaintiffs could have applied to TRPA for construction permits under the limited exception contained in Ordinance 81-5. *See TSPC I*, 911 F.2d at 1339; *see also Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 638 F.Supp. 126 (D.Nev.1986). Because this exception was not available for SEZ-classified lands, however, the panel held that the Nevada-side, SEZ plaintiffs' Period I claims were ripe. *See id.* at 1339. In their 1991 amended complaint, the Nevada plaintiffs attempted to reinstate the Class 1-3, Period I claims on the ground that it would have been "futile" for them to seek permits under the limited exception to Ordinance 81-5. The district court rejected this argument, holding that *TSPC I* controlled, and that the plaintiffs should have made their futility argument to the Ninth Circuit in *TSPC I*. *See Tahoe-Sierra Preservation Council, Inc. v. TRPA*, 808 F.Supp. 1474, 1478 (D.Nev.1992). It therefore dismissed those claims once again. *See id.* It appears from *TSPC III* that the plaintiffs did not appeal the district court's ruling. *See TSPC III*, 34 F.3d at 755 (appeal only of statute of limitations and Period III causation issues).

[6] The *TSPC III* court did not dismiss the California-side, Class 1-3 plaintiffs' Period I claims as unripe, because the exception contained in Ordinance 81-5 for case-by-case approval of development, which was available to the Nevada-side Class 1-3 plaintiffs, was not available to the California plaintiffs. *See TSPC II*, 938 F.2d at 156; *supra* note 5.

[7] In *TSPC I*, a panel of this court affirmed the dismissal of the Nevada-side plaintiffs' claims for Period III. There was no majority rationale, however, for the affirmance of the dismissal. *See TSPC I*, 911 F.2d 1336-39 (per curiam) (affirming the dismissal on the ground that the claims were unripe); *id.* at 1343-44 (B. Fletcher, J., concurring) (arguing that the dismissal should be affirmed on the ground that the claims were meritless); *id.* at 1344-47 (Kozinski, J., dissenting in part) (arguing that the claims were ripe); *see also Tahoe-Sierra Preservation Council*, 638 F.Supp. at 131-33 (dismissing the claims as unripe). In *TSPC II*, when confronted with the indistinguishable Period III claims of the California-side plaintiffs, this court reversed the district court's dismissal of those claims as unripe. *See TSPC II*, 938 F.2d at 157 (holding that the claims were ripe, but remanding rather than reaching the merits). While *TSPC II* reached the opposite result from *TSPC I*, the Nevada-side claims were not before *TSPC II*. Consequently, *TSPC II* did not affect the *TSPC I* court's judgment against these claims. Following remand from *TSPC I* and *TSPC II*, the California and Nevada cases were consolidated, and the plaintiffs were permitted to file amended complaints. In their amended complaint, the Nevada plaintiffs attempted to reinstate their Period III claims on the ground that *TSPC II* was the law of the case. The district court rejected this argument, and dismissed those claims once again. The district court held that *TSPC I*'s ruling that the claims be dismissed was also law of the case, and that the district court would follow *TSPC I's judgment* in spite of the inconsistency with *TSPC II's reasoning*. *See Tahoe Sierra Preservation Council, Inc. v. TRPA*, 808 F.Supp. 1474, 1478 (D.Nev.1992). It appears from *TSPC III* that the plaintiffs did not appeal the district court's ruling. *See TSPC III*, 34 F.3d at 755.

To the extent that any of the rulings in *TSPC I* and *TSPC II* are inconsistent, our decision herein renders that fact inconsequential. Even had the Nevada plaintiffs' Period III claims not been dismissed, the plaintiffs would have lost as to those claims on this appeal for the same reasons applicable to the California plaintiffs.

The *TSPC III* court's treatment of the plaintiffs' Period IV claims is the second relevant element of procedural history. Following remand from *TSPC I* and *TSPC II*, the Nevada and California cases were consolidated for further proceedings in the United States District Court for the District of Nevada, Judge Edward C. Reed presiding. The plaintiffs were permitted to amend their complaints and, in doing so, they added the Period IV claims – the claims regarding the 1987 Regional Plan which had been adopted while the litigation was pending. Shortly thereafter, the district court dismissed all of plaintiffs' claims for Periods I, II, and IV, including the § 1983 claims, on the ground that they were all time-barred by a sixty-day statute of limitation provision contained in the 1980 Compact. *See Tahoe Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 808 F.Supp. 1474 (D.Nev.1992) (Nevada case); *Tahoe Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 808 F.Supp. 1484 (D.Nev.1992) (California case). On appeal, this court reversed in part. *See TSPC III*, 34 F.3d 753 (9th Cir.1994). The *TSPC III* court upheld the dismissal of some of the plaintiffs' claims on statute of limitations grounds. *See* 34 F.3d at 755. The court held, however, that the sixty-day statute of limitations period contained in the 1980 Compact did not apply to the plaintiffs' § 1983 claims. *See id.* at 756. Finding that the plaintiffs had "fail[ed] to plead affirmatively any other statute of limitations," the court held that the defendants had forfeited all other statute of limitations defenses. *Id.*

The events of the most recent remand constitute the final element of the procedural history relevant to the present appeal. Following remand from *TSPC III* in 1995,

the parties conducted a year-long settlement effort. Those efforts collapsed in early 1997. The district court then resolved the plaintiffs' remaining claims in two published orders. The first order, issued in early 1998, resolved the plaintiffs' Period IV claims (the claims regarding the 1987 Plan). In it, the district court held that, despite this court's holding in *TSPC III*, the plaintiffs' claims for Period IV were in fact time-barred by the relevant statute of limitations for § 1983 actions in Nevada and California. *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 992 F.Supp. 1218 (D.Nev.1998). The second order, published in early 1999 following an eleven-day bench trial, resolved on the merits the issue of liability for the remaining claims.[8] *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 34 F.Supp.2d 1226 (D.Nev.1999). In the order, the district court held, among other things, that: (1) Ordinance 81-5 and Resolution 83-21 were facially invalid because they constituted a categorical taking of the plaintiffs' property, and that TRPA is therefore liable under § 1983 for violating the plaintiffs' Fifth Amendment rights during Period I and Period II; and (2) TRPA is not liable under § 1983 for any taking that may have occurred during Period III,

[8] In accord with the above chart of claims, the district court stated that only the following claims remained to be addressed at the trial: the Period I § 1983 claims of all the California plaintiffs and the Nevada SEZ plaintiffs; the Period II § 1983 claims of all the plaintiffs; and the Period III claims of the California plaintiffs.

because it was the court injunction prohibiting the implementation of the 1984 Plan that barred further development during that period and TRPA's conduct was not the actionable cause of the injunction.

ISSUES ON APPEAL

The defendants appeal the district court's holding that they are liable under § 1983 for a categorical taking during Period I and Period II. The plaintiffs cross-appeal the district court's holding that the defendants are not liable under § 1983 for any taking that occurred during Period III, and the court's holding that the plaintiffs' § 1983 claims for Period IV are time-barred.[9]

DISCUSSION

I. TIME PERIODS I & II

The defendants contend that the district court erred in holding that Ordinance 81-5, which was in effect during Period I, and Resolution 83-21, which was in effect during Period II, constituted categorical takings of each plaintiff's property under the standard set forth in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). As discussed above, these laws were enacted to suspend development in the Lake Tahoe Basin pending the adoption of a new regional land-use plan.

[9] The District Court certified all of these issues for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), and we granted the petition for permission to appeal.

A.

The Takings Clause of the Fifth Amendment prohibits the government from taking "private property . . . for public use, without just compensation." U.S. Const. amend. V. Courts have had little success in devising any set formula for determining when government regulation of private property amounts to a regulatory taking.[10] Thus, the Supreme Court has repeatedly recognized that "whether a particular restriction [amounts to a taking] depends largely 'upon the particular circumstances [of each] case' " – that is, on "essentially ad hoc, factual inquiries." *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978); *see also Lucas*, 505 U.S. at 1015, 112 S.Ct. 2886. In this regard, the Supreme Court and lower courts have indicated that most regulatory takings cases should be resolved by balancing the public and private interests at stake, with three primary factors weighing in the balance: (1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation has interfered with distinct investment-backed expectations, and (3) the character of the governmental action. *See, e.g., Penn Central*, 438 U.S. at 124, 98 S.Ct. 2646; *Dodd v. Hood River County*,

---

[10] For much of the nation's history, it was generally thought that the Takings Clause reached only the direct appropriation, or the functional equivalent of a "practical ouster of [the owner's] possession." *Transportation Co. v. Chicago*, 99 U.S. 635, 642, 25 L.Ed. 336 (1879). In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922), however, the Supreme Court recognized that government regulation of property could "go[ ] too far" and amount to a taking of that property. *See id.* at 415, 43 S.Ct. 158.

136 F.3d 1219, 1228 (9th Cir.1998); *District Intown Properties Ltd. v. District of Columbia*, 198 F.3d 874, 879 (D.C.Cir.1999).[11]

The Court's evaluation in various cases of the three factors identified in *Penn Central* illustrates that the content of these factors is not amenable to pat description. For example, it is clear that a regulation's "economic effect upon the claimant" may be measured in several different ways. *See Hodel v. Irving*, 481 U.S. 704, 714, 107 S.Ct. 2076, 95 L.Ed.2d 668 (1987) (looking to the market value of the property); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 493-96, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987) (looking to whether the regulation makes the property owner's business operation "commercially impracticable"); *Andrus v. Allard*, 444 U.S. 51, 66, 100 S.Ct. 318, 62 L.Ed.2d 210 (1979) (looking to the possibility of other economic uses besides sale, which was prohibited by the challenged regulation). Similarly, the "character of the governmental action" depends on several things, including whether the action is properly

---

[11] In the special context of exactions – land-use decisions conditioning approval of development on the dedication of property to public use – the Supreme Court has developed a different test to determine whether a regulatory taking has occurred. *See Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987). The Court has held that the *Nollan/Dolan* test is inapposite to regulatory takings cases outside the context of excessive exactions. *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 703, 119 S.Ct. 1624, 143 L.Ed.2d 882 (1999) (overruling in part *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422 (9th Cir.1996)).

characterized as a physical occupation of the property, *see Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982), and whether the regulation advances a legitimate public purpose, *see Keystone Bituminous Coal Ass'n*, 480 U.S. at 485-6, 107 S.Ct. 1232; *Agins v. Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980).

The Supreme Court has identified two specific circumstances in which it will find a government regulation to constitute a "categorical" taking without performing an ad hoc balancing under *Penn Central*. The first situation involves regulations that compel a property owner to suffer a permanent physical "invasion" or "occupation" of his property. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982). In that circumstance, the "character of the governmental action" – ordinarily one of the factors balanced under *Penn Central* – itself becomes sufficient to effect a taking. As the Court held in *Loretto*:

> [A] "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government. . . . [w]hen the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred. In such a case, "the character of the government action" not only is an important factor in resolving whether the action works a taking but also is determinative.

Loretto, 458 U.S. at 426, 102 S.Ct. 3164. The categorical rule applicable to physical invasion cases is clearly not applicable to the present case.

"The second situation in which [the Court] ha[s] found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land." *Lucas*, 505 U.S. at 1015, 112 S.Ct. 2886; *see also Agins*, 447 U.S. at 260, 100 S.Ct. 2138. Here, too, ad hoc balancing is not required because one factor of the *Penn Central* test becomes dispositive. In this instance, it is the "economic impact of the regulation" that becomes determinative: the regulation constitutes a "categorical" taking when it deprives the claimant of "all economically beneficial and productive use of [his] land." *Lucas*, 505 U.S. at 1015, 112 S.Ct. 2886. *Cf. Dodd*, 136 F.3d at 1228.[12]

With respect to Periods I and II, the only question before us is whether the rule set forth in *Lucas* applies – that is, whether a categorical taking occurred because Ordinance 81-5 and Resolution 83-21 denied the plaintiffs "all economically beneficial or productive use of land." *Lucas*, 505 U.S. at 1015, 112 S.Ct. 2886. Below, the district court ruled that the regulations did not constitute a taking under *Penn Central*'s ad hoc approach, but that they did constitute a categorical taking under *Lucas*. *See Tahoe-Sierra Preservation Council*, 34 F.Supp.2d at 1238-45. The defendants appealed the district court's latter holding, but the plaintiffs did not appeal the former. And even if

---

[12] As do other courts, we use the term "categorical taking" throughout this opinion as a shorthand reference to government action that is determined to be a "taking" under the categorical approach set forth in *Lucas* (where the "economic impact of the regulation" is determinative). *See, e.g., District Intown Properties*, 198 F.3d at 882-83; *Dodd*, 136 F.3d at 1228. In other words, as with the categorical approach set forth in *Loretto*, it is the approach that is categorical, not the "taking."

arguments regarding the *Penn Central* test were fairly encompassed by the defendants' appeal, the plaintiffs have stated explicitly on this appeal that they do not argue that the regulations constitute a taking under the ad hoc balancing approach described in *Penn Central*. More generally, the plaintiffs do not contest that California's and Nevada's objective of preserving the environmental health and aesthetic beauty of Lake Tahoe is an entirely permissible governmental goal. Nor do they dispute that the restrictions imposed on their properties are appropriate means of securing the purpose set forth in the Compact. In view of the limited nature of the plaintiffs' arguments on appeal, we address our specific inquiry to whether the facts of this case present one of the "relatively rare situations" where "regulation denies all economically beneficial or productive use of land." *Lucas*, 505 U.S. at 1018, 112 S.Ct. 2886.

Our focus is also narrowed by the fact that the plaintiffs bring only a facial challenge to Ordinance 81-5 and Resolution 83-21. In facial takings claims, our inquiry is limited to "whether the mere enactment of the [regulation] constitutes a taking." *Agins*, 447 U.S. at 260, 100 S.Ct. 2138; *see also Keystone Bituminous Coal Ass'n*, 480 U.S. at 493, 107 S.Ct. 1232; *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 295, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981); *Garneau v. City of Seattle*, 147 F.3d 802, 807 (9th Cir.1998). For that reason, we look only to the regulation's " 'general scope and dominant features,' " rather than to the effect of the application of the regulation in specific circumstances. *Garneau*, 147 F.3d at 807 (quoting *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 397, 47 S.Ct. 114, 71 L.Ed. 303 (1926)); *see also Agins*, 447

U.S. at 260, 100 S.Ct. 2138; *Keystone Bituminous Coal Ass'n*, 480 U.S. at 493, 494, 107 S.Ct. 1232; *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. at 297, 101 S.Ct. 2352. In this connection, "since it is difficult to demonstrate that [the] 'mere enactment' of a piece of legislation" amounts to a taking, the Court has recognized that facial takings challenges "face an uphill battle." *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 736 n. 10, 117 S.Ct. 1659, 137 L.Ed.2d 980 (1997); *see also Keystone Bituminous Coal Ass'n*, 480 U.S. at 495, 107 S.Ct. 1232; *Garneau*, 147 F.3d at 807.

B.

The plaintiffs contend that, for purposes of determining whether the regulations constitute a categorical taking under *Lucas*, we should not treat the plaintiffs' properties as the fee interests that they are. Instead, they argue, we should define narrowly, as a separate property interest, the temporal "slice" of each fee that covers the time span during which Ordinance 81-5 and Resolution 83-21 were in effect. It is this carved-out piece of each plaintiff's property interest, the plaintiffs assert, that has been "taken" by the regulations.

"Because our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction.' "[13] *Keystone Bituminous Coal Ass'n*, 480 U.S.

---

[13] The problem of defining the relevant property interest at stake is commonly referred to as either the "denominator problem" or the problem of "conceptual severance."

at 497, 107 S.Ct. 1232 (quoting Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L.Rev. 1165, 1192 (1967)). In other words, for purposes of determining whether a "taking" of the plaintiffs' "property" has occurred, the proper inquiry is what constitutes the relevant "property"? Is it the fee interest that must be "taken," or is it some lesser unit of property? Property interests may have many different dimensions. For example, the dimensions of a property interest may include a physical dimension (which describes the size and shape of the property in question), a functional dimension (which describes the extent to which an owner may use or dispose of the property in question), and a temporal dimension (which describes the duration of the property interest). At base, the plaintiffs' argument is that we should conceptually sever each plaintiff's fee interest into discrete segments in at least one of these dimensions – the temporal one – and treat each of those segments as separate and distinct property interests for purposes of takings analysis. Under this theory, they argue that there was a categorical taking of one of those temporal segments.

While Supreme Court precedent has not over the years been entirely uniform in its treatment of the conceptual severance question, *compare Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922) (employing conceptual severance) *with Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987) (rejecting conceptual severance in the identical context), most modern case law rejects the invitation of property holders to engage in

conceptual severance, except in cases of physical invasion or occupation. Several cases illustrate the Court's refusal to employ this concept in other types of circumstances. In *Penn Central Transportation Company v. City of New York*, the Penn Central Transportation Company entered into a contract for the construction and lease of an office building above its Grand Central Terminal in New York City. 438 U.S. at 116, 98 S.Ct. 2646. When the City denied two alternate building plans on the ground that they would destroy the architectural appeal of the historic landmark, Penn Central filed suit, claiming that the rejection of the building plans constituted a taking. *Id.* at 117-18, 98 S.Ct. 2646. In affirming the denial of its takings claim, the Court explicitly rejected Penn Central's proposal to consider the airspace above the Terminal as a property interest separate from the rest of the Terminal site. The Court explained:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in *the parcel as a whole* – here, the city tax block designated as the "landmark site."

Id. (emphasis added); *see also MacLeod v. County of Santa Clara*, 749 F.2d 541, 547 (9th Cir.1984).

The Court also refused to employ conceptual severance in *Keystone Bituminous Coal Association v.*

DeBenedictis, which considered the effect of Pennsylvania's Bituminous Mine Subsidence and Land Conservation Act on the property rights of mining companies. As implemented, the Act generally required 50% of the coal beneath certain protected structures to be kept in place as a means of providing surface support. *Id.* at 476-77, 107 S.Ct. 1232. The petitioners, who had purchased both mining rights and waivers for any surface damage caused by mining, argued that the Act constituted a taking. *Id.* at 478-79, 107 S.Ct. 1232. In particular, the petitioners argued that the Act appropriated the portion of coal that they were required to leave in the ground. *Id.* at 497, 107 S.Ct. 1232. They also argued that the Act entirely destroyed the value of each petitioner's "support estate," which is recognized under Pennsylvania law as a separate interest in land. *Id.* In essence, the petitioners argued that there had been a categorical taking of these two distinct property interests.

In holding that the regulation of the petitioners' mining rights did not amount to a taking, the Supreme Court refused to consider the coal that the Act required the petitioners to leave in place as a separate property interest; rather, the Court emphasized, takings jurisprudence must consider the "parcel as a whole." *Id.* at 497-99, 107 S.Ct. 1232. In addition, the Court described Pennsylvania's recognition of a support estate as a "legalistic distinction[ ]" that could not convert the support estate into a separate property interest for takings law purposes. *Id.* at 500-02, 107 S.Ct. 1232.

The Court's general rule against conceptual severance is not limited to the spatial dimension of property rights. In *Andrus v. Allard*, the Court applied its general

rule in a more functional dimension, to the "bundle" of rights that make up what we think of as "property." In that case, federal regulation prohibited the sale of eagle feathers. *Id.* at 53-54, 100 S.Ct. 318. The plaintiffs argued that the denial of the right to sell their feathers constituted a taking. *Id.* at 64 & n. 21, 100 S.Ct. 318. The Court rejected the takings claim, and, in so doing, rejected the conceptual disaggregation of property rights: "[W]here an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its entirety." *Andrus*, 444 U.S. at 65-66, 100 S.Ct. 318 (citing *Penn Central*, 438 U.S. at 130-31, 98 S.Ct. 2646).[14]

In fact, the Supreme Court has already once rejected conceptual severance in the temporal dimension of property rights. In *Agins v. Tiburon*, the city of Tiburon had instituted condemnation proceedings against the plaintiffs' property, but abandoned the proceedings a year later. The plaintiffs brought suit, contending, *inter alia*, "that the city's aborted attempt to acquire the land through eminent domain had destroyed the use of the

---

[14] Although *Andrus* demonstrates that individual strands of the property-rights bundle should generally not be treated as separate property interests, the Supreme Court has held that the total abrogation of the "right to exclude" may in certain circumstances constitute a taking because it "will result in an actual physical invasion of the privately owned [property]." *Kaiser Aetna v. United States*, 444 U.S. at 179-80, 100 S.Ct. 383. *Cf. Irving*, 481 U.S. at 716, 107 S.Ct. 2076 (holding, under the special circumstances of that case, that the complete abrogation of the plaintiffs' rights of descent and devise was "similar[ ]" to the denial of the right to exclude invalidated in *Kaiser Aetna*, and thus resulted in a taking).

land during the pendency of the condemnation proceedings." At 258 n. 3, 100 S.Ct. 2138.*Agins*, 447 U.S. The Supreme Court rejected the plaintiffs' claim, holding:

> The State Supreme Court correctly rejected the contention that the municipality's good faith planning activities, which did not result in the successful prosecution of an eminent domain claim, so burdened the appellants' enjoyment of their property so as to constitute a taking. Even if the appellants' ability to sell their property was limited during the pendency of the condemnation proceeding, the appellants were free to sell or develop their property when the proceedings ended. *Mere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are "incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense."*

447 U.S. at 263 n. 9, 100 S.Ct. 2138 (citations omitted) (emphasis added) (quoting *Danforth v. United States*, 308 U.S. 271, 285, 60 S.Ct. 231, 84 L.Ed. 240 (1939)). In rejecting the takings claim, the Court relied only on the fact that the plaintiffs were able to sell or develop their property after the city abandoned its condemnation claim. By relying on the temporary nature of the restriction, the Court rejected the invitation to carve out, as a separate property interest, a temporal "slice" of the parcel that existed for the time period during which the condemnation proceedings were in progress. For, had the Court considered the plaintiffs' rights in their property during that time period as a separate interest, the plaintiffs' ability to sell or develop their property *after* the time period ended would have been irrelevant to the Court's takings analysis. Only the ability to sell or develop the

property during the condemnation period would have mattered.

Agins's rejection of conceptual severance in the temporal dimension is consistent with the Court's rejection of other forms of conceptual severance in *Penn Central* and *Andrus*. It would make little sense to accept temporal severance and reject spatial or functional severance. A planning regulation that prevents the development of a parcel for a temporary period of time is conceptually no different than a land-use restriction that permanently denies all use on a discrete portion of property, or that permanently restricts a type of use across all of the parcel. *See* Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 Colum.L.Rev. 1667, 1674-78 (1988). Each of these three types of regulation will have an impact on the parcel's value, because each will affect an aspect of the owner's "use" of the property – by restricting *when* the "use" may occur, *where* the "use" may occur, or *how* the "use" may occur. Prior to *Agins*, the Court had already rejected takings challenges to regulations eliminating all "use" on a portion of the property, and to regulations restricting the type of "use" across the breadth of the property. *See Penn Central*, 438 U.S. at 130-31, 98 S.Ct. 2646; *Keystone Bituminous Coal Ass'n*, 480 U.S. at 498-99, 107 S.Ct. 1232; *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384, 397, 47 S.Ct. 114, 71 L.Ed. 303 (1926) (75% diminution in value caused by zoning law); *see also William C. Haas & Co. v. City & County of San Francisco*, 605 F.2d 1117, 1120 (9th Cir.1979) (value reduced from $2,000,000 to $100,000). In those cases, the Court "uniformly reject[ed] the proposition that diminution in property value, standing alone,

can establish a 'taking.' " *Penn Central*, 438 U.S. at 131, 98 S.Ct. 2646; *see also Concrete Pipe and Products, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 645, 113 S.Ct. 2264, 124 L.Ed.2d 539 (1993). There is no plausible basis on which to distinguish a similar diminution in value that results from a temporary suspension of development.

To not reject the concept of temporal severance, we would risk converting every temporary planning moratorium into a categorical taking. *See Penn Central*, 438 U.S. at 130, 98 S.Ct. 2646; *Stern v. Halligan*, 158 F.3d 729, 734 (3rd Cir.1998); Michelman, *supra*, at 1193. Such a result would run contrary to the Court's explanation that it is "relatively rare" that government "regulation denies all economically beneficial or productive use of land." *Lucas*, 505 U.S. at 1015, 112 S.Ct. 2886.

More important, the widespread invalidation of temporary planning moratoria would deprive state and local governments of an important land-use planning tool with a well-established tradition. Land-use planning is necessarily a complex, time-consuming undertaking for a community, especially in a situation as unique as this. In several ways, temporary development moratoria promote effective planning. First, by preserving the status quo during the planning process, temporary moratoria ensure that a community's problems are not exacerbated during the time it takes to formulate a regulatory scheme. *See* Elizabeth A. Garvin & Martin L. Leitner, *Drafting Interim Development Ordinances: Creating Time to Plan*, Land Use Law and Zoning Digest, June 1996, at 3, 3; *Schafer v. City of New Orleans*, 743 F.2d 1086, 1090 (5th Cir.1984). Relatedly, temporary development moratoria prevent developers and landowners from racing to carry out

development that is destructive of the community's interests before a new plan goes into effect. Such a race-to-development would permit property owners to evade the land-use plan and undermine its goals. *See id.; Miller v. Board of Public Works*, 195 Cal. 477, 234 P. 381, 388 (1925).[15] Finally, the breathing room provided by temporary moratoria helps ensure that the planning process is responsive to the property owners and citizens who will be affected by the resulting land-use regulations. *See* Robert H. Freilich, *Interim Development Controls: Essential Tools for Implementing Flexible Planning and Zoning*, 49 J. Urb. Law 65, 79 (1971). Absent the pressure of trying to out-speed developers who are attempting to circumvent the planning goals, the "planning and implementation process may be permitted to run its full and natural course with widespread citizen input and involvement, public debate, and full consideration of all issues and points of view." Garvin and Leitner, *supra*, at 3. Given the importance and long-standing use temporary moratoria, courts should be exceedingly reluctant to adopt rulings that would threaten the survival of this crucial planning mechanism.

In opposition to the overwhelming legal and logical support for not conceptually severing fee interests into small temporal pieces, the plaintiffs argue (and the district court below decided) that the Court's decision in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250

---

[15] In fact, there is evidence that such a race-to-develop occurred in the Lake Tahoe Basin in the years preceding the adoption of the 1980 Compact. *See Tahoe-Sierra Preservation Council*, 34 F.Supp.2d at 1241.

(1987), compels such conceptual severance of the property rights in this case. The plaintiffs contend that *First English* holds that conceptual severance of the temporal dimension of property interests is generally required. This argument is flatly incorrect.

First English is not even a case about what constitutes a taking. In *First English*, property owners challenged an ordinance that prevented the development of property located on a flood plain; they sought "damages for the uncompensated taking of all use" of the property. *See id.* at 309, 107 S.Ct. 2378. The California Court of Appeal rejected their claims on the ground that, regardless of whether a taking occurred, the claimants could not recover damages during the period running from the time of enactment of the ordinance to the time when it was finally declared unconstitutional. *See id.* Because the question presented to the Supreme Court related only to the remedy available *once a taking had been proven*, the Court stated explicitly that it was not addressing whether the ordinance constituted a taking. *See id.* at 313, 107 S.Ct. 2378 ("We accordingly have no occasion to decide whether the ordinance at issue actually denied appellant all use of its property. . . . "). According to the Court, it was resolving only the question whether, *once a taking is established*, "abandonment [of that taking] by the government requires payment of compensation for the period of time during which regulations" that constitute a taking are in effect. *Id.* at 318, 107 S.Ct. 2378; *see also Id.* at 311, 107 S.Ct. 2378 (noting that the "disposition of the case [by the California court on the assumption that a taking occurred] isolates the remedial question for our consideration"); Michelman, *supra*, at 1617 & n. 81.

It is true that *First English* holds that, when a *taking* has occurred, the government must compensate property owners, even if the taking is "temporary." Contrary to the plaintiffs' suggestion, however, the Court's holding in *First English* was not that temporary moratoria are "temporary takings." In fact, the opposite is true. The *First English* Court very carefully defined " 'temporary' regulatory takings [as] those regulatory takings which are ultimately invalidated by the courts."[16] 482 U.S. at 310, 107 S.Ct. 2378. What is "temporary," according to the Court's definition, is not the regulation; rather, what is "temporary" is the taking, which is rendered temporary only when an ordinance that effects a taking is struck down by a court. In other words, a *permanent* regulation leads to a *"temporary"* taking when a court invalidates the ordinance after the taking. *See id.* at 319, 107 S.Ct. 2378 ("Invalidation of the ordinance or its successor ordinance after this period of time, though converting the taking into a 'temporary' one, is not a sufficient remedy to meet the demands of the Just Compensation Clause."); *id.* at 317, 107 S.Ct. 2378 (discussing the fact "that the government may elect to abandon its intrusion or discontinue regulations," and thereby turn what would otherwise be a "permanent taking" into a " 'temporary' taking"). The Court's definition, therefore, does not comprehend temporary moratoria, which from the outset are designed to last for only a limited period of time. In short, we reject the plaintiffs' contentions that *First English* applies to temporary moratoria and that it works a radical change

---

[16] The Court was careful to include quotation marks around the word "temporary" whenever it referred to a "temporary" taking, in order to make clear that it was using the concept in the specific sense in which it had defined it.

to takings law by requiring that property interests be carved up into finite temporal segments.[17]

---

[17] In concluding that *First English* created a categorical rule in favor of temporal severance, the district court relied heavily on the Court's statement in *First English* that it "do[es] not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us." 482 U.S. at 321, 107 S.Ct. 2378. The district court held that the statement amounted to an enumeration of the acceptable forms of planning-related temporary development prohibitions, and that this statement implied the existence of a categorical rule prohibiting temporary development delays caused by regulatory actions other than those listed in the Court's statement. We do not think, however, that the Court intended to create a new categorical rule concerning what constitutes a taking (one that would directly conflict with the principles applied in previous cases) in a passing remark about what the Court "do[es] not deal with." This is especially so in light of the fact that, in *First English*, the Court repeatedly stated that the question whether a taking occurred was not before it. Even were we to accord the Court's dictum some weight, it appears to support, rather than undermine, our position. The list suggests that planning activities that temporarily prohibit development do not constitute takings. There is no suggestion that the list is exclusive. In fact, reading it to be exclusive would require us to draw a constitutional distinction between different conventional planning tools that result in similar development delays. We think such a distinction is untenable. Moreover, even were we to treat the list as exclusive, it appears to encompass temporary planning moratoria. The list allows for "normal delays in obtaining . . . changes in zoning ordinances." 482 U.S. at 321, 107 S.Ct. 2378. The reason that changes in zoning ordinances generally lead to delays and development, however, is that local governments often enact temporary development moratoria during the period in which the new ordinance is being formulated. *See supra* at 777. Thus, even the list itself appears to contemplate temporary development moratoria.

In addition to misinterpreting *First English*, the district court erred in concluding that *United States v. General Motors Corp.*, 323 U.S. 373, 65 S.Ct. 357, 89 L.Ed. 311 (1945), and *United States v. Petty Motor Co.*, 327 U.S. 372, 66 S.Ct. 596, 90 L.Ed. 729 (1946), support conceptual severance in the present case. In these cases, the federal government used its power of eminent domain to condemn leaseholds during World War II. Both cases were concerned with the level of compensation owed to the ousted lessees. The fact that just compensation was required in these cases, however, has no bearing on the question before us. Both cases involved the physical occupation by the federal government of the property at issue and thus fall within the categorical rule established by the Court for cases involving physical invasions. As we have explained, physical occupations and appropriations have always received markedly different analytic treatment than other regulatory takings. The Supreme Court has clearly held that the physical invasion or possession by the government of a fragment of a larger parcel constitutes a per se taking – in other words, conceptual severance is the norm. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982). Just as *General Motors* and *Petty Motor* require compensation for the government's condemnation of a leasehold, *Loretto* requires compensation for the permanent physical appropriation of a tiny fragment of an apartment building. *See Loretto*, 458 U.S. at 426, 102 S.Ct. 3164. The conceptual severance that is the

norm in these physical appropriation cases, however, does not extend to other regulatory takings claims.[18]

In short, we reject the plaintiffs' suggestion that we engage in conceptual severance. The relevant property interests in the present case are the whole parcels of property that the plaintiffs own.

C.

Having determined that the property interest at stake is just what one would expect it to be – the plaintiffs' fee interests – we must evaluate whether Ordinance 81-5 and Resolution 83-21 effected a categorical taking of each plaintiff's property.[19] For purposes of this analysis, two features of these provisions are relevant. First, the provisions effectively placed a moratorium on the development of the plaintiffs' property.[20] The second relevant

---

[18] In fact, in a World War II era case involving a regulation that prohibited the owners of gold mines from using those mines, rather than permitting the government to take possession of the property, the Court found that no taking occurred. *See United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168-69, 78 S.Ct. 1097, 2 L.Ed.2d 1228 (1958).

[19] Although TRPA first passed Ordinance 81-5 and later adopted Resolution 83-21, each regulation was designed to terminate upon the occurrence of the same event – TRPA's adoption of an amended regional plan. Accordingly, we treat the regulations as creating a single temporary moratorium that was designed to and did run from the date on which Ordinance 81-5 became effective to the date on which TRPA adopted the 1984 Plan.

[20] This is actually an overstatement. As the district court noted, both regulations may have permitted certain limited

feature of the provisions is that the moratorium they effected was intended to be temporary – the regulations were designed to institute a temporary moratorium that would remain in effect *only* until a new regional land-use plan could be adopted.[21] *See Union Oil Co. v. Morton*, 512 F.2d 743, 751 (9th Cir.1975) (describing a regulation as temporary if its "termination is conditioned [on] the occurrence of certain future events").

To determine whether the temporary moratorium instituted by TRPA's regulations denies "all economically beneficial or productive use" of the plaintiffs' land, we must first consider the meaning of the phrase "economically beneficial or productive use." The phrase's precise meaning is elusive, and has not been clarified by the

---

development, particularly on the Class 1-3 land. *See Tahoe-Sierra Preservation Council*, 34 F.Supp.2d at 1243-44. The district court concluded that these development possibilities were negligible, and did not affect the "takings" calculus. While we have some doubts about the district court's conclusion, the correctness of that conclusion is irrelevant to our analysis. Accordingly, we will assume arguendo that the *moratorium* prevented all development in the period during which it was in effect.

[21] We acknowledge that, given that moratoria are, by definition, temporary, it is redundant to refer to a moratorium as a "temporary moratorium." *See* Webster's Third New International Dictionary 1469 (1976) (defining "moratorium" as a "waiting period set by some authority: a delay officially required or granted"). Nevertheless, because the parties, the district court, and this court have all repeatedly referred to the moratorium at issue in the present case as a "temporary moratorium," and because it emphasizes the temporary nature of the development ban, we use that designation here. *See, e.g., TSPC I*, 911 F.2d at 1339; *TSPC II*, 938 F.2d at 155; *Tahoe-Sierra Preservation Council*, 34 F.Supp.2d at 1248.

Supreme Court. *See, e.g., Lake Nacimiento Ranch Co. v. County of San Luis Obispo*, 841 F.2d 872, 877 (9th Cir.1988). The central confusion over its meaning centers on the relationship between the "use" of property and its "value."[22] Clearly, the economic value of property provides strong evidence of the availability of "economically beneficial or productive uses" of that property.[23]

---

[22] *See William C. Haas & Co.*, 605 F.2d at 1120-21 (noting the close relationship between a land-use regulation's effect on the available "use" of a property and the effect on its "value"); *MacLeod*, 749 F.2d at 546 (implicitly noting the same).

[23] Many cases treat the "use" and "value" interchangeably, or speak only of the effect of a regulation on the property's value. *See, e.g., TSPC I*, 911 F.2d at 1335 (suggesting that a "taking" is measured by "diminution of the value of plaintiffs' land"); *Lucas*, 505 U.S. at 1017, 112 S.Ct. 2886 ("What is land but the profits thereof?"); *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. at 295, 101 S.Ct. 2352 (the "ad hoc, factual inquiries" required under *Agins*'s "viable used" prong "must be conducted with respect to . . . particular estimates of economic impact and ultimate valuation relevant in the unique circumstances"); *MacLeod*, 749 F.2d at 549 ("The determination of whether or not an economically viable use of property remains . . . turns upon the economic impact of the regulation and, particularly, the extent to which the regulations or prohibition has interfered with the distinct investment-backed expectations of the claimant."(citation omitted)); *Carson Harbor Village Ltd. v. City of Carson*, 37 F.3d 468, 476 (9th Cir.1994), *overruled on other grounds by WMX Technologies v. Miller*, 104 F.3d 1133, 1136 (9th Cir.1997) (en banc) ("In the takings context, the basis of a facial challenge is that the very enactment of the statute has reduced the value of the property or has effected a transfer of a property interest."); *Keystone Bituminous Coal Ass'n*, 480 U.S. at 493, 500-501, 107 S.Ct. 1232; *Suitum*, 520 U.S. at 748, 117 S.Ct. 1659 (O'Connor, J., concurring); *Lucas*, 505 U.S. at 1009, 1010, 1017-18 & n. 8, 1020 & n. 9, 1026 & n. 13, 112 S.Ct. 2886; *Agins*, 447 U.S. at 262, 100 S.Ct. 2138; *Penn Coal*, 260 U.S. at 413, 43 S.Ct. 158; *Concrete Pipe*, 508 U.S. 602, 644, 113 S.Ct. 2264, 124 L.Ed.2d 539 (1993).

Nevertheless, there are instances in which certain kinds of "value" may be poor measures of the existence of such uses. In any event, we need not resolve the sticky issues surrounding the meaning and proof of the existence of "economically beneficial or productive uses," because it is clear from the "general scope and dominant features" of Ordinance 81-5 and Resolution 83-21 that the temporary moratorium imposed by these regulations did not deprive the plaintiffs' land in the Lake Tahoe Basin of either all of its "value" or all of its "use."[24] *Garneau*, 147 F.3d at 807.

---

[24] The parties disagree over what kind of evidence either party may introduce about the effect of the land-use regulations on specific pieces of property. Before trial, the parties stipulated that, because the action consists only of a facial challenge, "the parties will not introduce evidence regarding the specific factual situations of individual plaintiffs." In spite of this stipulation, the defendants argue on appeal that, even though the plaintiffs brought only a facial challenge, the plaintiffs cannot succeed in proving that a taking occurred without introducing evidence regarding the specific economic impact of the regulations on their individual properties. The defendants' argument that individualized evidence is required is in tension with the pre-trial stipulation. It is also in tension with the statement, made in several cases, that a facial taking challenge "present[s] no concrete controversy concerning . . . [the legal provision's] effect on specific parcels of land." *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. at 295, 101 S.Ct. 2352. This tension need not be resolved, however, because reference to the general features of the land-use regulations at issue is sufficient to demonstrate that those regulations do not deprive the plaintiffs' property of all use or value.

First, as amici Cities and Counties of California note, basic principles of economics show that the moratorium did not render the plaintiffs' property valueless.[25] *See generally Lucas*, 505 U.S. at 1020, 112 S.Ct. 2886 (assuming, as the basis for its decision, that the regulation at issue rendered Lucas's two beachfront lots "valueless"). The moratorium was temporary – it was designed to and did dissolve upon the adoption of a new regional plan. Given that the ordinance and resolution banned development for only a limited period, these regulations preserved the

---

[25] In resolving the question of the remaining value of the plaintiffs' property, the district court relied heavily on *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422 (9th Cir.1996). Because the general features of the regulation at issue in the present case make clear that the plaintiffs' property retains value, *Del Monte Dunes*'s discussion of proof of value is irrelevant to our determination. We should note, however, that the district court misread *Del Monte Dunes* in at least two ways. First, the district court ignored the fact that the *Del Monte Dunes* court was reviewing a jury's finding that a taking occurred, and that the *Del Monte Dunes* court thus considered only whether there was sufficient evidence to support the jury's finding. *See* 95 F.3d at 1433. Second, the district court interpreted *Del Monte Dunes* to hold that a "competitive market" is *necessary* to preclude a finding that a taking occurred.However, *Del Monte Dunes* does not stand for so strong a proposition: the *Del Monte Dunes* court held only that, as a matter of law, the presence of a single buyer was *not sufficient* to require the court to upset the jury's finding that a taking had occurred. *See id.* at 1432-33. The only mention *Del Monte Dunes* makes of a "competitive market" is its suggestion that the absence of such a market is a piece of *evidence* that may tend to support a finding of an absence of value. *See id.* at 1433.

bulk of the future developmental use of the property. This future use had a substantial present value.[26]

Of course, were a temporary moratorium designed to be in force so long as to eliminate all present value of a property's future use, we might be compelled to conclude that a categorical taking had occurred. We doubt, however, that a true temporary moratorium would ever be designed to last for so long a period. Certainly, the moratorium at issue here was not. The temporary moratorium was designed to suspend development only until a new regional land-use plan could be formulated – a process that the 1980 Compact intended would take thirty months. While the completion of the regional plan actually took forty months (which led to the temporary moratorium remaining in effect for eight months longer than expected), the moratorium still was in effect for only thirty-two months.[27]

---

[26] This economic reality is precisely what differentiates a permanent ban on development, even if subsequently invalidated, from a temporary one. Basic economic theory demonstrates that the present value of land depends on the potential for future use. Accordingly, when a permanent development ban (like the one at issue in *Lucas*) is enacted, the value of the affected land plummets, on account of the fact that the ban bars all future development of the property. In contrast, when a temporary ban is enacted, both the owner of the affected land and any prospective purchasers know that, at a specific point in the future, the moratorium will no longer prohibit the development of the land at issue.

[27] We note that the average time between land purchase and development may be as long as 25 years. *See Tahoe-Sierra Preservation Council*, 34 F.Supp.2d at 1240.

Moreover, there is no evidence that owners or purchasers of property in the basin anticipated that the temporary moratorium would continue indefinitely. Nor would they have had reason to: the district court found that TRPA worked diligently to complete the regional plan as quickly as possible. *See Tahoe-Sierra Preservation Council*, 34 F.Supp.2d at 1250-51. Thus, while the temporary moratorium surely had a negative impact on property values in the basin, we cannot conclude that the interim suspension of development wiped out the value of the plaintiffs' properties.

Furthermore, the temporary moratorium did not deprive the plaintiffs of all "use" of their property. The "use" of the plaintiffs' property runs from the present to the future. (This is a simple corollary of our earlier conclusion that the plaintiffs' property interests may not be temporally severed.)[28] By instituting a temporary development moratorium, TRPA denied the plaintiffs only a small portion of this future stream; the thirty-two months during which the moratorium was in effect represents a small fraction of the useful life of the Tahoe properties.[29]

---

[28] This corollary also demonstrates that, had we engaged in conceptual severance, we would have read into the Takings Clause a requirement that the government never interfere with a property owner's wish to put his property to *immediate* use.

[29] Although we need not rely on it, we note that, even during the period of time during which the moratorium was in effect, there were cognizable "uses" to which the basin property could have been put. Although we assume for purposes of our disposition that no development of the property was permitted, *see supra* note 19, "use" includes much more than development. For example, *Lucas* treats the sale of property as an "economically productive use." *See Lucas*, 505 U.S. at 1028, 112 S.Ct. 2886. In addition, we have held that "[h]olding property for investment purposes can be a 'use' of property." *MacLeod*, 749 F.2d at 546 n. 7.

Because the temporary development moratorium enacted by TRPA did not deprive the plaintiffs of all of the value or use of their property, we hold that it did not effect a categorical taking.[30] Indeed, given the above analysis, it is equally clear that the district court was correct to conclude that the moratorium did not constitute a taking under the *Penn Central* test. *See Tahoe-Sierra Preservation Council*, 34 F.Supp.2d at 1240-42. Thus, while the district court was correct as to this latter point, we reverse its holding that a categorical taking occurred. In reaching this conclusion, we preserve the ability of local governments to do what they have done for many years – to engage in orderly, reasonable land-use planning through a considered and deliberative process. To do otherwise would turn the Takings Clause into a weapon to be used indiscriminately to penalize local communities for attempting to protect the public interest.

II. TIME PERIOD III

The plaintiffs raise two issues on cross-appeal, the first of which concerns the district court's holding

---

[30] Note that, in so holding, we do not overturn any factual findings made by the district court, only its legal conclusions. Although the district court found that the plaintiffs were denied "all economically beneficial or productive use" of their property, it did so on the basis of its legal conclusion that only substantial developmental uses available *during* the moratorium period were relevant.

regarding Period III – the period after the passage of the 1984 Plan and before the passage of the 1987 Plan.[31] The district court held that TRPA's adoption of the 1984 Plan was not the actionable cause of any deprivation of the plaintiffs' Fifth and Fourteenth Amendment rights that occurred during this period. According to the court, the injunction issued by Judge Garcia against TRPA, in a separate suit brought by the state of California and the League to Save Lake Tahoe, prevented the adoption of the 1984 Plan from being either the "but for" or the proximate cause of any taking that may have occurred during Period III. For this reason, the court held that, as to that period, TRPA could not be held liable under § 1983.[32] On cross-appeal, the plaintiffs argue that the district court erred in concluding that TRPA's actions were not the legal cause of any taking during the period in question.

In a section 1983 action, the plaintiff must demonstrate that the defendant's conduct was the actionable cause of the claimed injury. *See, e.g., Arnold v. IBM Corp.*, 637 F.2d 1350, 1355 (9th Cir.1981). To meet this causation requirement, the plaintiff must establish both causation-in-fact and proximate causation. *See Van Ort v. Estate of Stanewich*, 92 F.3d 831, 837 (9th Cir.1996); *Arnold*, 637 F.2d

---

[31] This portion of the appeal concerns only the California-side plaintiffs. *See supra note* 7.

[32] Because the district court concluded that TRPA could not be held liable for any taking that occurred during the 1984-87 period, it did not determine (1) whether the developmental moratorium effected by the injunction actually amounted to a taking, or (2) whether the 1984 Plan, had it been implemented, would have amounted to a taking. We, too, do not decide these questions.

at 1355; *Hoffman v. Halden*, 268 F.2d 280, 295 (9th Cir.1959), *overruled in part on other grounds by Cohen v. Norris*, 300 F.2d 24 (9th Cir.1962). The parties agree that this requirement applies to the plaintiffs' § 1983 claims, which allege a violation of the Takings Clause, as much as it would to any other § 1983 claim.[33] Like other factual determinations, causation-in-fact is reviewed for clear error. In addition, we review findings of proximate cause for clear error, even though they present mixed questions of law and fact. *See Exxon Co. v. Sofec, Inc.*, 54 F.3d 570, 576 (9th Cir.1995) (holding that, although it "is an exception to the general rule that mixed questions of law and fact are reviewed de novo," issues of proximate cause are reviewed under the clearly erroneous standard); *George v. City of Long Beach*, 973 F.2d 706, 709 (9th Cir.1992); *Britton v. Price*, 950 F.2d 602, 604 (9th Cir.1991).[34]

---

[33] It is true that there is little discussion of a "causation" requirement in any of the case law involving regulatory takings. *But cf. Penn Central*, 438 U.S. at 124, 98 S.Ct. 2646 (noting, in passing, the proximate cause requirement). However, this is due to nothing more than the fact that, in most regulatory takings cases, there is no doubt whatsoever about whether the government's action was the cause of the alleged taking.

[34] The plaintiffs suggest that, in the absence of sufficient guidance from § 1983 cases or other federal constitutional case law, we should look to state tort law for guidance as to the meaning of proximate cause. The Supreme Court "ha[s] repeatedly noted that 42 U.S.C. § 1983 creates a species of tort liability, and ha[s] interpreted the statute in light of the background of tort liability." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 709, 119 S.Ct. 1624, 143 L.Ed.2d 882 (1999) (citations and internal quotation marks omitted). Nevertheless, there are meaningful differences between § 1983 liability and state tort liability, and these differences may in

The plaintiffs argue on two grounds that the district court clearly erred when it concluded that TRPA's conduct was not the actionable cause of the claimed taking of the plaintiffs' property from 1984 to 1987. First, they argue that the injunction is irrelevant to any consideration of "cause," because the 1984 Plan was actually implemented and itself constituted a regulatory taking.[35] We disagree. Contrary to the plaintiffs' contention, the injunction issued by Judge Garcia effectively prohibited the implementation of the 1984 Plan.[36] The order that granted the injunction read in pertinent part:

> That, until conclusion of trial of this matter, the defendant TRPA, its agents, servants, employees, and all other persons acting under the authority of and in concert with TRPA, hereby are enjoined and restrained from taking

---

certain circumstances diminish the relevance of, or warrant departure from, the principles of tort liability. *See Monell v. Department of Social Servs.*, 436 U.S. 658, 693-94, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) (holding that the tort law doctrine of respondent superior does not apply to § 1983 suits brought against local governments). In the present case, we need not rely on any specific state tort case law, because it is clear that under forseeability analysis – which is widely accepted by both federal and state case law as a conventional method of assessing proximate cause – TRPA is not legally responsible for any taking that occurred during Period III.

[35] Although the plaintiffs did not raise this argument until their cross-appeal reply brief, we exercise our discretion to address it on the merits.

[36] Because we conclude that the injunction prohibited the implementation of the 1984 Plan, we need not decide whether the plan, had it been implemented, would have constituted a taking of the plaintiffs' property. *See supra* note 32.

> any action to approve any project, as defined in to [sic] Tahoe Regional Planning Compact, Public Law 96-551, 94 Stat. 3233 (1980), or to approve the construction of any man-made development within the agency's jurisdiction, including the any of the 2,343 developments referred to in the Court's June 15, 1984 opinion, and including the acceptance of applications for such agency approval. . . .

As the district court's order makes clear, the injunction prohibited TRPA from taking "any action" to approve any project, and even prohibited it from accepting permit applications. Without the ability to accept, process, or grant applications, it is impossible to see how TRPA could have implemented the 1984 Plan, the purpose of which was to regulate the granting of new permits.[37] Consequently, as this court pointed out in *TSPC II*, "th[e] plan never went into effect."[38] 938 F.2d at 155. Thus, the 1984 Plan itself could not have constituted a taking.

---

[37] The plaintiffs suggest that the 1984 Plan somehow effected a taking in the few days that passed between the time of the plan's adoption and the adoption of the TRO. As Judge B. Fletcher noted in *TSPC I*, however, it would have been impossible for TRPA to implement the plan during these few days, or for the plaintiffs to "complete[ ] all the necessary prerequisites to building, including getting a TRPA permit." *TSPC I*, 911 F.2d at 1344 (B. Fletcher, J., concurring).

[38] The plaintiffs also argue that, even if the plan did not go into effect, the injunction did not "prevent TRPA from providing the Plaintiffs with Just Compensation." The failure to provide such compensation, they assert, is itself an actionable wrong. The plaintiffs' argument skips over the question of liability. If TRPA is not legally responsible for any taking that occurred during Period III, then TRPA has no obligation to provide just compensation to the plaintiffs.

In the alternative, the plaintiffs argue that, even if the 1984 Plan was not itself implemented, TRPA's adoption of the plan effectuated a taking by causing the injunction to issue. Specifically, they contend that (1) the adoption of the 1984 Plan was both a "but for" and the proximate cause of the issuance of the injunction, and (2) the injunction constituted a taking of the plaintiffs' property.[39] For at least two reasons, we reject the plaintiffs' alternative argument.

First, the district court did not clearly err in holding that TRPA reasonably did not foresee that the 1984 Plan would be enjoined. It is well-established that foreseeability analysis is an appropriate part of proximate cause determinations in § 1983 actions. *See, e.g., Arnold,* 637 F.2d at 1355; *Johnson,* 588 F.2d at 743-44. *Cf. Van Ort,* 92 F.3d at 837 (noting that unforeseen, intervening causes break the chain of proximate causation in § 1983 actions). *See generally Palsgraf v. Long Island R. Co.,* 248 N.Y. 339,

[39] Although it is a logically necessary component of their argument, the plaintiffs do not directly support their implicit assertion that the court injunction resulted in a taking of the plaintiffs' property. Their general argument that a taking occurs when a legislative or executive body implements a temporary building moratorium provides indirect support for this position, but the plaintiffs never explain why a temporary moratorium ordered by a *court* should be treated in the same fashion. In fact, there are good reasons to believe that a government action that would otherwise constitute a taking should be treated differently when it is ordered by a court. Moreover, even if a court order could qualify as a taking, it is not clear who, if anyone, would be held liable for that taking under § 1983. Obviously, however, it would ordinarily not be the party that has no choice but to follow the court order.

162 N.E. 99 (1928). Employing such an analysis, the plaintiffs argue that TRPA is legally responsible for the effects of the injunction because TRPA should have reasonably foreseen that it would be sued as a result of its adopting the 1984 Plan. Even if a lawsuit was foreseeable, however, it is the foreseeability of the injunction, not the foreseeability of a lawsuit, that is relevant to proximate causation here. The district court concluded that TRPA reasonably did not foresee that an injunction would issue. *See Tahoe-Sierra Preservation Council,* 34 F.Supp.2d at 1248. The record supports this determination: TRPA sought to adopt a plan that would comply with the Compact, and it had been advised by counsel that its legislative discretion to adopt a plan would be given great deference by the courts; accordingly, it had no reason to believe that it would lose a lawsuit or that the 1984 Plan would be enjoined. Rather than contest this fact, the plaintiffs make the bald assertion that TRPA secretly wanted an injunction against all construction in the basin. However, they point to no evidence in the record to support this contention.

Although TRPA could not have foreseen, prior to adopting the 1984 Plan, that an injunction would issue, the fact that the district court did issue an injunction reveals a second reason why TRPA may not be held legally responsible for any injury that occurred during Period III: in retrospect, there was little TRPA could have done to prevent the injunction. The reason is that "the 'wrongdoing' plaintiffs claim [that TRPA committed] was not the 'wrongdoing' that triggered the injunction." *TSPC I,* 911 F.2d at 1434 (B. Fletcher, J., concurring). The wrongdoing about which the plaintiffs complain was TRPA's

adoption, in 1984, of a regional plan that was *overly restrictive* of development. As Judge Fletcher noted in *TSPC I*, however, "the court granted the injunction based on California's and the League's claim that the Plan *was not strict enough:* it would permit construction of single-family residence [sic] in excess of compact limits and inflict environmental damage, and the Plan also did not abide by the Compact's stricter procedural requirements for project approval." *Id.* (emphasis added). Thus, had TRPA avoided its alleged wrongdoing – by adopting a more lenient plan that met with the plaintiffs' approval – it is even more certain that an injunction would have issued. In short, the lack of a causal connection between the alleged wrongdoing and the purported harm compels the conclusion that TRPA may not be held liable for the effects of the injunction.

For the foregoing reasons, we affirm the district court's holding that TRPA's actions were not the actionable cause of any taking that may have occurred during Period III, and that the defendants therefore may not be held liable as to that period under § 1983.

III. TIME PERIOD IV

The second issue that the plaintiffs raise on cross-appeal concerns the district court's resolution of the claims regarding the 1987 Plan (the Period IV claims). The plaintiffs first added these claims when they amended their complaints in 1991. At that time, the defendants moved to dismiss the plaintiffs' claims for all four time periods on the ground that the claims were barred by the

sixty-day statute of limitations included in the 1980 Compact.[40] The district court agreed as to the claims regarding Periods I, II, and IV, and dismissed those claims.[41] On appeal, we reversed as to the § 1983 claims. We held:

> TSPC . . . brought one claim under 42 U.S.C. § 1983 for the violation of its civil rights by the actions of TRPA in adopting the 1981 Ordinance, the 1983 Resolution, the 1984 Plan and the 1987 Plan. . . . As to § 1983 it is established law that there is a single statute of limitation to be applied. . . . Obviously, the single state statute of limitations to be applied in all § 1983 actions cannot be the special 60-day period provided by the Compact. The defendants did not plead any other statute of limitations except the 60-day one. Failing to plead affirmatively any other statute of limitations, they cannot now rely on any other. No part of TSPC's § 1983 claim is time-barred.

TSPC III, 34 F.3d at 756, *as amended by* 42 F.3d 1306 (citations omitted).

On remand, the defendants asserted in their answers that the plaintiffs' § 1983 claims regarding Period IV,

---

[40] Article VI(j)(4) of the 1980 Compact reads as follows:

> A legal action arising out of the adoption or amendment of the regional plan or of any ordinance or regulation of the agency . . . shall be commenced within 60 days after final action by the agency.

[41] The district court dismissed the Period III claims on the ground that the 1984 Plan caused no harm because it had been enjoined. *See TSPC III*, 34 F.3d at 755; *see also supra* text accompanying notes 30-38 (affirming the district court's holding regarding the Period III claims).

while not barred by the sixty-day statute of limitations, were barred by the applicable statutes of limitations – a one-year limit for § 1983 actions in California, and a two-year limit for § 1983 actions in Nevada.[42] *See Tahoe-Sierra Preservation Council*, 992 F.Supp. at 1221. The district court agreed on the merits. In addition, the court held that the law of the case doctrine did not preclude it from holding the plaintiffs' Period IV claims time-barred, even though the *TSPC III* court had concluded otherwise. The district court concluded that it was not compelled to follow *TSPC III* because we had clearly erred in that case when we held that the plaintiffs had forfeited the right to rely on the correct statute of limitations period by failing to "plead" that statute "affirmatively." Accordingly, it dismissed the Period IV § 1983 claims. On cross-appeal, the plaintiffs argue that the district court had no authority to deviate from the law of the case set forth in *TSPC III*. Rather, they contend, only another panel of this court may decline to follow the law of the case established in a disposition of this court.

As an initial matter, we note that the plaintiffs' argument is largely academic. Even were the district court bound absolutely by the holding in *TSPC III*, *we* would still have discretion, under the circumstances present

---

[42] Because § 1983 does not contain a statute of limitations, federal courts apply the forum state's statute of limitations for personal injury claims. *See Wilson v. Garcia*, 471 U.S. 261, 276, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985). In California, the applicable statute of limitations is one year. *See Johnson v. California*, 207 F.3d 650, 653 (9th Cir.2000). In Nevada, the applicable statute of limitations is two years. *See Perez v. Seevers*, 869 F.2d 425, 426 (9th Cir.1989).

here, to decline to follow the law of that case. In addition to being academic, however, the plaintiffs' argument may well be incorrect. In *United States v. Cuddy*, 147 F.3d 1111 (9th Cir.1998), we held that the district court did not abuse its discretion when it declined to follow, on remand, a holding we had issued on appeal. *See id.* at 1114-15. We concluded that the district court had acted within its discretion because it was correct in determining that our holding was clearly erroneous. *See id.* In addition to our holding in *Cuddy*, we have suggested in dicta on several occasions that district courts may, in certain circumstances, decline to follow law of the case set forth by this court. In fact, one of our standard formulations of the law of the case doctrine includes subordinate, as well as coordinate, courts: "Under the doctrine of law of the case, 'a court is generally precluded from reconsidering an issue that has already been decided by the same court, *or a higher court* in the identical case.' [However,] a court may have discretion to depart from the law of the case where [certain features are present.]" *Rebel Oil Co. v. Atlantic Richfield Co.*, 146 F.3d 1088, 1093 (9th Cir.1998) (emphasis added) (quoting *United States v. Alexander*, 106 F.3d 874, 876 (9th Cir.1997)); *see also Moore v. Jas. H. Matthews & Co.*, 682 F.2d 830, 833 (9th Cir.1982). *But cf. Thomas v. Bible*, 983 F.2d 152, 155 (9th Cir.1993) (suggesting, in dicta, that the "level or levels of the court or courts involved" has some bearing on a court's discretion to deviate from law of the case).

While our case law appears to support the authority of a district court to deviate from the law of the case in appropriate circumstances, we do not decide whether such circumstances existed in this case. Instead, we reach

the same decision as the district court on the alternate ground that, regardless of the district court's authority to decline to follow the law of the case established by this court in *TSPC III*, we have the discretion to do so and we exercise that discretion here. The law of the case doctrine provides that a panel of this court has discretion to depart from the law of the case established by the same panel, or another, where: "(1) the decision is clearly erroneous and its enforcement would work a manifest injustice, (2) intervening controlling authority makes reconsideration appropriate, or (3) substantially different evidence was adduced at a subsequent trial." *Jeffries v. Wood*, 114 F.3d 1484, 1489 (9th Cir.1997) (en banc) (footnote and internal quotes omitted).[43] The holding in *TSPC*

---

[43] For some time, there have existed in the Ninth Circuit two different formulations of the set of circumstances in which a court may decline to follow the law of the case. The first formulation, set forth in a line of cases that includes *Jeffries*, states that a court may depart from the law of the case if "the [previous] decision is clearly erroneous *and* its enforcement would work a manifest injustice." *Jeffries*, 114 F.3d at 1489 (emphasis added); *see also Leslie Salt Co. v. United States*, 55 F.3d 1388, 1392 (9th Cir.1995). In contrast, the second formulation states that a court may decline to follow the law of the case if "the first decision was clearly erroneous" *or* "a manifest injustice would otherwise result." *Cuddy*, 147 F.3d at 1114; *see also United States v. Alexander*, 106 F.3d 874, 876 (9th Cir.1997); *Russell v. Commissioner of Internal Revenue*, 678 F.2d 782, 785 (9th Cir.1982). While one might have expected that *Jeffries*, being an en banc decision, would control all future cases, at least three post-*Jeffries* cases cite the disjunctive formulation, which is inconsistent with *Jeffries*. *See United States v. Scrivner*, 189 F.3d 825, 827 (9th Cir.1999); *Cuddy*, 147 F.3d at 1114; *Disimone v. Browner*, 121 F.3d 1262, 1266 (9th Cir.1997).

III falls squarely into the first category: the decision was "clearly erroneous and its enforcement would work a manifest injustice." *Id.*

In order to understand why the holding in *TSPC III* is clearly erroneous, one must first understand what it is that *TSPC III* held. In concluding that the defendants had forfeited their right to argue at any point in the litigation that the plaintiffs' § 1983 claims were time-barred, the *TSPC III* court stated: "The defendants did not *plead* any other statute of limitations except the 60-day one. Failing to *plead affirmatively* any other statute of limitations, they cannot now rely on any other." *TSPC III*, 34 F.3d at 756 (emphasis added). On appeal, the plaintiffs argue that the court used the term "plead" in its non-technical sense, to mean simply "argue" or "contend." We think it evident, however, that the court used the term in its conventional legal sense, to mean "assert in a pleading." Both courts and lawyers know that the term "plead," when used in a legal context, has that meaning. When a court uses the term in an opinion, therefore, we presume, in the absence of evidence to the contrary, that the court meant to employ the standard legal meaning. Here, there is no

---

Recently, we noted this conflict – which appears to have gone unrecognized in previous case law – but did not resolve it. *Mendenhall v. NTSB*, 213 F.3d 464(9th Cir.2000). As in *Mendenhall*, we need not resolve the conflict in the present case. For, as the following discussion demonstrates, there are grounds here to depart from the law of the case set forth in *TSPC III* under the more stringent *Jeffries* standard as well as under the more popular disjunctive standard. (Of course, any case that meets the *Jeffries* standard a fortiori meets the disjunctive standard.)

indication to the contrary. Quite the opposite: the adverb that the *TSPC III* court used in conjunction with the term "plead" bolsters our reading. In rejecting the affirmative defense, the court did not merely state that the defendants had failed to "plead" the proper limitation period; instead, it stated that the defendants had failed to "plead affirmatively" the proper period. This more specific term – "plead affirmatively" – makes it even clearer to us that the *TSPC III* court used the term "plead" in its legal rather than popular sense. After all, the statute of limitations defense at issue in *TSPC III* is an affirmative defense – a type of defense that, in legal parlance, must be "plead affirmatively." For these reasons, we conclude that *TSPC III* held that the defendants forfeited their right to argue another limitations period by failing to assert that period *in a responsive pleading*.

Given our conclusion about what *TSPC III* held, it follows that *TSPC III*'s holding was clearly erroneous. At the time that we heard the appeal in *TSPC III*, none of the defendants had ever filed an answer, or any other type of responsive pleading. *See TSPC*, 992 F.Supp. 1218, 1223 (D.Nev.1998). Instead, in response to both the original complaints and the amended complaints, the defendants had filed motions to dismiss. A motion to dismiss is not a pleading. *See* Fed.R.Civ.P. 7(a) (designating "pleadings"); *Miles v. Department of Army*, 881 F.2d 777, 781 (9th Cir.1989) ("[A] motion to dismiss the complaint is not a responsive pleading."). Thus, it was not until the remand following *TSPC III*, when the defendants filed answers to the plaintiffs' complaints, that the defendants finally

"pled."[44] And in those first responsive pleadings, the defendants pled the pertinent statutes of limitations for the § 1983 claims. Accordingly, *TSPC III* clearly erred in holding that the defendants failed to "plead affirmatively" those statutes.

In addition to the clear factual error, *TSPC III*'s bare legal holding – that the defendants forfeited the correct statute of limitations defense – is clearly wrong. The defendants raised the correct limitations periods in their answers. The inclusion of the defense in an answer is sufficient to preserve the defense. *See Magana v. Northern Mariana Islands*, 107 F.3d 1436, 1446 (9th Cir.1997); Fed. R. Civ. Pro. 8(c). In fact, we have permitted defendants to raise affirmative defenses for the first time well after filing an answer, *see Magana*, 107 F.3d at 1446, and have also permitted district courts to raise an affirmative defense sua sponte, so long as the defense has not been affirmatively waived, *see Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 686-87 (9th Cir.1993).

Although it is true that, prior to filing their answers, the defendants had asserted, by way of a motion to dismiss, a statute of limitations defense premised on a mistaken choice of law, the defendants' mistake does not in any way constitute a waiver of all other limitations periods. *See Zotos v. Lindbergh Sch. Dist.*, 121 F.3d 356, 361 (8th Cir.1997) (rejecting argument that defendant waived application of 90-day limitation period by relying only on a two-year limitation period in its summary judgment

---

[44] Of course, it is understandable that the panel in *TSPC III* might not have realized that, ten years into the litigation, the defendants had not yet actually answered the complaints.

motion); *Yoder v. Honeywell Inc.*, 104 F.3d 1215, 1224 n. 3 (10th Cir.1997) ("We hold that [the defendant] did not waive the statute of limitations defense simply by pleading the defense based on the wrong choice of law.") *Cf. Daingerfield Island Protective Soc'y v. Babbitt*, 40 F.3d 442, 444-45 (D.C.Cir.1994).[45]

In addition to being clearly erroneous, *TSPC III*'s holding would result in a manifest injustice were we to follow it. *Jeffries* held that a court may find that an erroneous decision works a manifest injustice if "the challenged decision . . . involve[s] a significant inequity or the extinguishment of a right. . . . " *Jeffries*, 114 F.3d at 1492. In the present case, the clear error in *TSPC III* would lead to a significant inequity. Were we to follow *TSPC III*'s erroneous holding, the defendants would lose their opportunity to present this dispositive defense – a defense that fully vindicates their right to be free from a trial and an adverse damage award. Of course, depriving a defendant of a statute of limitations defense might not always be significantly inequitable. Here, however, the defendants did nothing that would have misled the plaintiffs or constituted a forfeiture of that defense. In marked

---

[45] The plaintiffs suggest that if a defendant raises a particular time bar in a motion to dismiss, it must raise all potential time bars in that motion. This argument is clearly incorrect. Some time bars may be resolved on such a motion and others may not. For example, a time bar that turns on the resolution of factual disputes may only be resolved at a later stage of the litigation. It would make little sense to require defendants with multiple potential time bar defenses, some of which may be subject to resolution on a motion to dismiss and some of which may not, to raise all of those defenses at the very outset of the proceeding.

contrast, the plaintiffs failed to bring their claims regarding the 1987 Plan until more than four years after the plan became effective, which is more than two years after Nevada's statute of limitations had run, and more than three years after California's. These circumstances, combined with the fact that the defense is both timely and dispositive, convince us that the requisite inequity exists in the present case.

Because the time bar holding in *TSPC III* is clearly erroneous and would be manifestly unjust if enforced, we decline to follow it. On the merits, the district court held the plaintiffs' claims time-barred, and the plaintiffs affirmatively decline to argue on appeal that the district court's resolution of that question is incorrect. Even when asked by this court at oral argument, the plaintiffs stressed that they disputed only the district court's authority to deviate from the law of the case set forth in a disposition of this court. Their decision not to argue the merits of the time-bar issue is not surprising, given that they filed the Period IV claims years after the relevant statutes of limitations had run. Because the plaintiffs offer no argument on the merits of the timeliness of their Period IV claims, we affirm the district court's dismissal of those claims.

AFFIRMED in part and REVERSED in part. REMANDED for entry of judgment in favor of defendants in accordance with this disposition.

TAHOE-SIERRA PRESERVATION COUNCIL, INC., et al., Plaintiffs,
v.
TAHOE REGIONAL PLANNING AGENCY, et al., Defendants.

No. CV-N-84-257-ECR.

Jan. 15, 1999.

Lawrence L. Hoffman, Law Offices of Lawrence L. Hoffman, Tahoe City, CA, Stephanie L. Williams, Sacramento CA, for Plaintiffs.

Daniel E. Lungren, Atty. Gen. of the State of Cal., Richard M. Frank, Asst. Atty. Gen., Daniel L. Siegel, Supervising Deputy Atty. Gen., Mary J. Scoonover, Deputy Atty. Gen., for Defendant State of Cal.

Frankie Sue Del Papa, Atty. Gen. of State of Nevada, William J. Frey, Deputy Atty. Gen., for Defendant State of Nevada.

Susan E. Scholley, E. Clement Shute, Jr., Ellison Folk, J. Thomas Susich, for Defendant Tahoe Regional Planning Agency.

FINDINGS OF FACT, CONCLUSIONS OF LAW, and ORDER

EDWARD C. REED, Jr., District Judge.

On December 1, 1998, after fourteen and a half years of litigation, the first phase of the trial in this action finally began. The case involves approximately 449 plaintiffs who own property in the Lake Tahoe Basin. The lead plaintiff, Tahoe-Sierra Preservation Council, Inc.

("TSPC"), is an association of Tahoe area property owners. Each of the individual plaintiffs has alleged that several ordinances enacted in the early 1980s by the defendant, Tahoe Regional Planning Agency ("TRPA"),[1] effected takings of his or her property under the Fifth and Fourteenth Amendments to the United States Constitution. Given the complexity of the case, as well as the sweeping changes in the law of regulatory takings that have occurred in the past fifteen years, it is, while unfortunate, not surprising that the case has been pending for so long. The first ten years or so were spent largely in an effort to determine whether any of the claims in the case were justiciable at all.

Clearly, however, the effort expended in this case – by all the parties and by the courts – has not been wasted. The dispute here is not over something trivial or unimportant. For what is at stake, at least in part, is the survival of Lake Tahoe, one of the wonders of the natural world. Whatever the ultimate outcome of this case, the fate of the lake deserves serious attention and thought. That, it has unquestionably received. The very tenacity with which the property owners herein have pursued their claims supports the idea that the lake is worth

---

[1] We note here that while both the states of Nevada and California have continued to act as if they were still defendants in the case, all claims against both states were actually dismissed long ago. Nonetheless, since most of TRPA's funding comes from the two states, and thus any judgment rendered against TRPA may have an impact on the states, and there being no objection by the plaintiffs, we allowed attorneys representing both states to participate in the trial, and generally to continue in the case.

fighting for. Were the Tahoe Basin not such a beautiful, desirable place to spend time, it is doubtful that the plaintiffs would have pursued their claims quite as vigorously, or in quite the same manner, as they have done over the years.

Unsurprisingly, a case pending for such a long period of time picks up something of a history along the way. Here, that history consists, in part, of three published Ninth Circuit opinions, at least five published district court opinions, and numerous unpublished district court orders. These orders and opinions have significantly narrowed and defined the scope of this case. Of course, many of these opinions also set forth versions of the facts, or some of the facts, involved in the case. We do not find it appropriate merely to refer to earlier statements of the facts, however, given that those statements were largely prepared in ruling on motions to dismiss or motions for summary judgment, where certain assumptions are made that may not always find themselves borne out by the evidence produced at trial. We thus present a complete discussion of the facts herein; we base our findings on the evidence and testimony presented at trial, and the stipulations agreed to by the parties.

FINDINGS OF FACT

Lake Tahoe, the dominant presence in this litigation, is a remarkable alpine lake located in the northern Sierra Nevada mountains. The lake is almost indescribably beautiful. Nonetheless, many have tried to describe it – the most notable of whom (and certainly the most quoted, at least during this trial) is Mark Twain. Twain, while

famous for his hyperbole, cannot be said to have exaggerated the beauty of Lake Tahoe, which he described as:

> a noble sheet of blue water lifted six thousand three hundred feet above the level of the sea, and walled in by a rim of snow-clad mountain peaks that towered aloft full three thousand feet higher still! . . . As it lay there with the shadows of the mountains brilliantly photographed upon its still surface I thought it must be the fairest picture the whole earth affords.

Mark Twain, *Roughing It* 169 (facsimile reprint of 1st ed., Hippocrene Books, n.d.) (1872). Further, the lake:

> was glassy and clear, or rippled and breezy, or black and storm-tossed, according to Nature's mood; and its circling border of mountain domes, clothed with forests, scarred with landslides, cloven by canons and valleys, and helmeted with glittering snow, fitly framed and finished the noble picture. The eye was never so tired of gazing, day or night, in calm or storm; it suffered but one grief, and that was that it could not look always, but must close sometimes in sleep.

Id. at 173.

Others, too, have attempted to describe the beauty of the lake, including sources more commonly cited in judicial opinions than Mark Twain. These include the Supreme Courts of California and Nevada, and even the President and Vice President of the United States. In July of 1997, President Clinton and Vice President Gore both attended the "Lake Tahoe Presidential Forum" in Incline Village, Nevada, on the northeast shore of the lake. The President referred to Lake Tahoe as "one of the crown

jewels, unique among them all. It's a national treasure that must be protected and preserved." Sean Whaley, *Clinton Pledges Tahoe Aid*, Las Vegas Rev.-J., July 27, 1997, at 1A. The Vice President stated that, "There is a peace associated with Lake Tahoe that is very, very special. . . . The beauty of this place is unique in all the world." Sean Whaley, *Gore Vows to Protect Lake*, Las Vegas Rev.-J., July 26, 1997, at 1A. The Nevada Supreme Court called the lake a "national treasure," *Kelly v. Tahoe Reg'l Planning Agency*, 109 Nev. 638, 855 P.2d 1027, 1034 (1993), and the California Supreme Court referred to the Basin as "an area of unique and unsurpassed beauty." *People ex rel. Younger v. County of El Dorado*, 5 Cal.3d 480, 96 Cal.Rptr. 553, 487 P.2d 1193, 1194 (Cal.1971). The plaintiffs, quite wisely, do not dispute the fact that Lake Tahoe is uniquely beautiful.

Ironically, the more Lake Tahoe comes to be appreciated for its beauty, the more that beauty is threatened. Part of what makes Tahoe so special is the amazing clarity of its water, which, as a result of its clarity, is an unusually beautiful cobalt blue color. Again, we revert to Mark Twain for a description. He described the clarity of Tahoe's water as follows:

> So singularly clear was the water, that where it was only twenty or thirty feet deep the bottom was so perfectly distinct that the boat seemed floating in the air! Yes, where it was even *eighty* feet deep. Every little pebble was distinct, every speckled trout, every hand's-breadth of sand . . . . Down through the transparency of these great depths, the water was not *merely* transparent, but dazzlingly, brilliantly so. All objects seen through it had a bright, strong vividness,

> not only of outline, but of every minute detail, which they would not have had when seen simply through the same depth of atmosphere. So empty and airy did all the spaces seem below us, and so strong was the sense of floating high aloft in mid-nothingness, that we called these boat-excursions "balloon-voyages."

Twain, *Roughing It* 174-75 (emphasis in original); *see also* Mark Twain, *Innocents Abroad* 262-265 (Harper & Brothers 1911) (1869) (comparing Lake Tahoe to Italy's Lake Como). Most lakes lack anything approaching this clarity, usually because of the presence of algae growing in their depths. Algae requires a nutrient-rich environment in which to grow, and most lakes contain sufficient amounts of the requisite nutrients to feed considerable algal growth. Not so Lake Tahoe, however, which has historically been lacking in both nitrogen and phosphorous, two of the nutrients algae requires. A lake which is deficient in such plant nutrients, like Tahoe, is "oligotrophic."

Unfortunately, this is rapidly changing. The clarity of the lake has been decreasing by at least a foot a year. As algal growth in the lake increases, its clarity decreases. In other words, the lake undergoes what is termed "eutrophication." Eutrophication is the process of becoming more "eutrophic," which, at least as it relates to a lake, is defined as "rich in dissolved nutrients. . . . " Webster's Third New International Dictionary 786 (1976). Eventually, unless the process is stopped, the lake will lose its clarity and its trademark blue color, becoming green and opaque for eternity. Or at least, for a very, very long time. Estimates are that, should the lake turn green, it could

take over 700 years for it to return to its natural state, if that were ever possible at all.

The increase in algal growth, and the attendant loss in water clarity, is caused by an increase in the amounts of nitrogen and phosphorous reaching the lake. The evidence clearly shows that this increase in nutrient levels is caused by increased development in the Lake Tahoe Basin ("the Basin"). Dramatic decreases in clarity first began to be noted in the late 1950s/early 1960s, shortly after development at the lake began in earnest in the 1950s. Clarity has decreased steadily since then. Even today, increased algal growth is more noticeable in areas of the lake near larger concentrations of human habitation and development.

Increased development causes increased nutrient loading of the lake largely because of the increase in impervious coverage of land in the Basin resulting from that development. Impervious coverage – such as asphalt, concrete, buildings, and even packed dirt – prevents precipitation from being absorbed by the soil. Instead, the water is gathered and concentrated by such coverage. Larger amounts of water flowing off a driveway or a roof have more erosive force than scattered raindrops falling over a dispersed area – especially one covered with indigenous vegetation, which softens the impact of the raindrops themselves. Apparently, even the force of a raindrop falling on bare earth has some erosive power, which the presence of vegetation mitigates. Thus disruptions to the natural plant cover caused by development further exacerbate the problem. The increase in impervious coverage seems to be a larger problem than the loss of plant cover, however – perhaps because so much of the

Basin's precipitation falls in the form of snow. One can only assume that a snowflake impacts the ground with less force than a raindrop. Yet runoff from the melting snow still produces erosion.

The concentrations of water running off areas of impervious coverage then flow rapidly over areas of uncovered earth, picking up nutrient-rich topsoil and bits of vegetation and debris as they go. The increase in runoff thus causes more debris and soil – and hence more nitrogen and phosphorous – to reach the lake than under natural conditions. Generally speaking, the steeper the slope, the more runoff will occur. Thus areas with steeper slopes are usually considered "high hazard" lands.

Of course, there is always some naturally occurring runoff. Normally, however, much of the runoff from upper elevations never reaches the lake. Instead, certain areas near streams and other wetlands – known as Stream Environment Zones ("SEZs") – act as filters for much of the debris that runoff carries. When SEZ lands are filled in and paved over, however, they cease to perform their natural function. Thus not only do the paved-over SEZ lands increase erosion due to the new impervious coverage, they also fail to mitigate erosion occurring at higher elevations farther from the lake. SEZ lands are therefore considered especially sensitive to the impact of development.

The most obvious response to this problem, of course, is to restrict development around the lake – especially in SEZ lands, as well as in areas already naturally prone to runoff. Given the high desirability of the Tahoe

Basin as a place to live and to vacation, however, restrictions on development, when they were imposed, were not well-received by all parties involved. Of course, if no one wanted to live there, no restrictions on development would have been necessary – leading the California Supreme Court to remark, almost thirty years ago, that "the region's natural wealth contains the virus of its ultimate impoverishment." *People ex rel. Younger v. County of El Dorado*, 5 Cal.3d 480, 96 Cal.Rptr. 553, 487 P.2d 1193, 1194 (1971). Clearly, though, people do want to live there – or at least vacation there. More people come to Lake Tahoe every year. While this classic struggle between development and the environment has been played out all over the country, the Tahoe area has seen some particularly epic battles of this kind.

The developing environmental problems at the lake first received significant attention in the 1960s. Given that two states, five counties, several municipalities, and the federal government (which, through the U.S. Forest Service, owns a large percentage of the land in the Basin) have jurisdiction over part of the lake or the surrounding area, the need for some type of coordinated response to the problem was obvious. Thus in 1969, the bi-state Tahoe Regional Planning Compact was approved by the United States Congress, after being passed by the legislatures of both Nevada and California. Pub.L. No. 91-148, 83 Stat. 360; 1967 Cal. Stat. ch. 1589, p. 3804, § 1, *amended by* 1968 Cal. Stat. ch. 988, p.1900, § 1; 1968 Nev. Stat. 4. The Compact created the defendant TRPA, and set goals for the preservation of the lake and the surrounding Basin.

Pursuant to the Compact, TRPA adopted, in 1972, Ordinance No. 4, a Land Use Ordinance which incorporated what is commonly known as the Bailey system. TRPA Ordinance No. 4, §§ 5.00, 6.00 (Defs.' Ex. 201). The Bailey system, named for its developer, Robert G. Bailey, classifies land in the Tahoe Basin according to how prone to environmental damage it is. *See generally*, Robert G. Bailey, Forest Service, U.S. Dept. of Agriculture, *Land-Capability Classification of the Lake Tahoe Basin, California-Nevada: A Guide for Planning* (1974) (Defs.' Ex. 203). Generally speaking, land with steeper slopes is naturally more prone to runoff, so even slight disturbances in vegetation or increases in land coverage can result in large increases in nutrient runoff. Bailey thus divided land in the Basin into seven "land capability districts," based largely on steepness, but also taking into account flood hazard, high water tables, poorly drained soils, landslides, fragile flora and fauna, and soil erodibility. These land capability districts are numbered 1 through 7, with 1 being the most environmentally sensitive, and 7 the least (relatively speaking). Each land capability district was assigned a land coverage coefficient – a recommended limit on the percentage of such land that could be covered by impervious surface. The coefficients are as follows:

land capability districts 1 and 2	1%
land capability district 3	5%
land capability district 4	20%
land capability district 5	25%
land capability districts 6 and 7	30%

Generally, land capability districts 1 through 3, because of the higher risk of erosion associated with these areas, are

grouped together and denominated "high hazard" or "sensitive" lands, while land capability districts 4 through 7 are referred to as "low hazard" or "non-sensitive" lands. (Actually, Bailey himself grouped them slightly differently, but that is how TRPA grouped them for planning purposes, and how they have been grouped throughout this litigation.) On average, "Class 1-3 lands" are the steepest lands in the Basin. SEZ lands constitute a special category of high hazard lands, and are classified as "1b" lands – sort of a subsection of land capability district 1. While SEZ lands are generally much less steep than other district 1 lands, they are nonetheless extremely sensitive, due to the nature of the function they perform when left in their natural state, as discussed above. Throughout, we refer to "Class 1-3 lands" and "SEZ lands" separately; although technically the term "Class 1-3" could be read to include SEZ (or 1b) lands, for clarity we have defined the term to exclude SEZ lands.

However, although Ordinance No. 4 adopted the Bailey system, it allowed numerous exceptions to the coverage recommendations. The building of new residential housing was not particularly limited. This led to significant dissatisfaction with TRPA's regulatory scheme. It became evident that the environment was continuing to decline, and that the 1969 Compact was not strong enough to fix the problem. California became so dissatisfied that it pulled its funding from TRPA, and its own agency, the California Tahoe Regional Planning Agency (formed in 1967, prior to the adoption of the Compact), began to impose stricter regulations on that part of the Basin lying within California.

Eventually, this dissatisfaction led to the amendment of the Tahoe Regional Planning Compact in 1980. Pub.L. No. 96-551, 94 Stat. 3233; 1980 Cal. Stat. ch. 872, p. 2710, § 2, codified at Cal. Gov't Code § 66801; 1980 Nev. Stat. 1, codified at N.R.S. 277.200 (the "1980 Compact"). The 1980 Compact restructured TRPA and its voting procedures, and directed it to establish environmental threshold carrying capacities and a new regional plan within a strict time table. The amended Compact became effective December 19, 1980; TRPA was required to adopt threshold carrying capacities within 18 months of that date, and a new regional plan within 12 months of the adoption of the carrying capacities. In addition, the amended Compact required that TRPA review all projects, and established temporary restrictions on development in the Basin pending the enactment of a new regional plan.

In addition to the requirements of the Compact, TRPA was faced with the need to develop a regional water quality plan, or 208 plan, as required by the EPA under the Clean Water Act, 33 U.S.C. § 1288 (1986). Although TRPA had proposed a 208 plan in 1979, California had rejected it, and agreement on a plan had still not been reached by the time the Compact was amended. Thus at the same time TRPA was grappling with the new Compact requirements, it was still embroiled in debate over the 208 plan. The plaintiffs have pointed to the fact that TRPA expended resources during the time immediately following the Compact's amendment on an (ultimately successful) attempt to develop a 208 plan, and have claimed that this is some kind of evidence that TRPA acted in bad faith in complying with the Compact requirements. This argument is completely meritless.

TRPA was under an obligation to development a 208 plan, and the agency clearly approached its obligations under both the Compact and the Clean Water Act with good faith and to the best of its ability. In addition, we note that much of the work done in preparing the 208 Plan was also necessary to the development of the regional plan, specifically the establishment of the threshold carrying capacities required by the Compact.

However, it is primarily the agency's response to the amended Compact that, inevitably, set this litigation in motion. On February 26, 1981, TRPA adopted Ordinance 81-1, which elaborated on what was meant by the term "project," as defined in the Compact. The Compact defined "project" as "an activity undertaken by any person, including any public agency, if the activity may substantially affect the land, water, air, space or any other natural resources of the region"; required all "projects" to be approved by TRPA; and directed the agency to "prescribe by ordinance those activities which it has determined will not have a substantial effect on the land, water, air, space or any other natural resources in the region and therefore will be exempt from its review and approval." 1980 Compact, Article II(h), Article VI(a)-(b). In other words, TRPA was required to identify what were *not* projects. This TRPA did in Ordinance 81-1. In relevant part, 81-1 made clear that the construction of new, single-family homes in "critical areas" (defined to include Class 1-3 lands and SEZ lands) was considered a "project" (subject to a minor exception for certain already approved subdivisions). TRPA Ordinance 81-1, § 3 .12 (Defs.' Ex. 217). Thus Ordinance 81-1 made it clear that, for the most part, owners of Class 1-3 and SEZ lands were

required to get a permit from TRPA before beginning construction of homes on their property.

Then, several months later, TRPA adopted Ordinance 81-5, the first of the three actions actually challenged in this case. The ordinance was enacted on June 25, 1981, with an effective date of August 24, 1981. TRPA Ordinance 81-5, § 16.00 (Defs.' Ex. 227). Even the defendants have admitted that Ordinance 81-5 "temporarily prohibit[ed] most residential and all commercial construction on land capability districts 1, 2, 3 and SEZs until a new regional plan was developed." Defs.' Tr. Br. at 13. Ordinance 81-5 actually amended the existing regional plan, referred to by its implementing ordinance, Ordinance No. 79-10. First, Ordinance 81-5 amended § 12.00 of Ordinance 79-10, entitled "Regulation of Development on High-Erosion and High-Runoff Hazard Lands." The amended section 12.00 provided that land in capability districts 1 through 3 (excluding SEZ lands) would be subject to a classification review, which came to be known as "case-by-case" review. The amendments to § 12.00 went on to provide that:

> Except as otherwise provided by this ordinance, no person shall perform any construction, work, use or activity, including without limitation, grading, clearing, removal of vegetation, filling or creation of land coverage, upon land within land capability districts 1a, 1c, 2 and 3 without first obtaining a permit from the Agency. The application for such a permit shall be reviewed and approved as a "project" pursuant to the Compact and the Rules and Regulations of Practice and Procedure of the Agency. . . .

TRPA Ordinance 81-5, § 2.20 (amending § 12.21 of Ordinance 79-10). Although specific findings were required for approval of any application that would result in land coverage in excess of the Bailey coefficients, such excess coverage was permitted. The coverage limitations in force were actually those set forth in § 9.24 of the Land Use Ordinance, or Ordinance No. 4 (Defs.' Ex. 201), or "twenty percent (20%) of the area of the pertinent lot or parcel, whichever is less." TRPA Ordinance 81-5, § 2.20 (amending § 12.23 of Ordinance 79-10). The coverage limitations of § 9.24 of Ordinance No. 4 were less restrictive than the Bailey coefficients. New commercial land coverage, on the other hand, was restricted to amounts consistent with the Bailey coefficients, at least in land capability districts 1-3 and SEZ lands. TRPA Ordinance 81-5, § 2.20 (amending § 12.40 of Ordinance 79-10). Further, § 12.60 was amended to read as follows:

> Except as otnerwise provided by this ordinance, and subject to the exceptions set forth in this subsection, no person shall perform any grading, clearing, removal of vegetation, filling or creation of land coverage upon land within land capability districts 1a, 1c, 2 and 3.

TRPA Ordinance 81-5 (amending § 12.60 of Ordinance 79-10). The exceptions referred to included already approved subdivisions, public works projects, areas already so modified by man that the land capability characteristics had been fundamentally changed ("man-modified areas"), approved erosion control work, and "outdoor recreation facilities." *Id.* Finally, the amendment provided for administrative challenges to land capability district classifications.

As to SEZ lands, the amendments provided for much more strict prohibitions on development:

> Notwithstanding any other provision of this ordinance or of any other ordinance of the Agency, no person shall perform any grading, clearing, removal of vegetation, filling or creation of land coverage, within or upon a stream environment zone ("SEZ"), as described or depicted upon maps contained in the Plan.

TRPA Ordinance 81-5, § 3.00 (amending § 13.00 of Ordinance 79-10). Further,

> Notwithstanding any other provision of this ordinance or of any other ordinance of the Agency, no person shall perform any construction, work, use or activity upon a lot or parcel containing an SEZ without first obtaining a permit from the Agency, the application for which permit shall be reviewed and approved as a "project". . . . Such application shall not be approved unless it is found by the Agency that it proposes no grading, clearing, removal of vegetation, filling or creation of land coverage within the SEZ. . . .

Id. The only exceptions for SEZ lands are for certain public works projects, man-modified areas, and approved erosion control work. Again, however, administrative challenges to a property's classification were allowed.

The other relevant provisions of Ordinance 81-5 deal with its applicability. On a first reading, the provisions of the ordinance that allow for the possibility of some construction in Class 1-3 lands appear to apply to all land in the Basin. *See* TRPA Ordinance 81-5, § 10.00 (amending

§ 20.00 of Ordinance 79-10). However, § 20.20 of Ordinance 79-10 was amended to continue in effect certain listed provisions of the California State Water Resources Control Board's Lake Tahoe Water Quality Plan, with respect to the California side of the Basin. Those provisions essentially barred new development in California on SEZ lands – or anywhere in excess of the Bailey coefficients. Defs.' Ex. 211. The final provision of Ordinance 81-5 that concerns us now relates to its effect date, which was defined as sixty days after the date of its adoption. TRPA Ordinance 81-5, § 16.00. As the ordinance was adopted on June 25, 1981, it became effective on August 24, 1981.

The effect of Ordinance 81-5 as to SEZ lands was thus to prohibit any construction, work, use or activity that involved any form of grading, clearing, removal of vegetation, filling or creation of land coverage – with or without a permit. Uses or activities that did not involve grading, clearing, removal of vegetation, filling or creation of land coverage appear to have been allowed – if a permit was obtained. The plain language of the ordinance thus seems to imply that even hiking or picnicking on SEZ land in its natural state would require a permit, although it is hard to imagine that TRPA would have enforced the ordinance so literally. These restrictions appear to be effectively the same in both Nevada and California.

As to Class 1-3 lands, however, there is a significant difference between Nevada and California. In Nevada, the provisions of Ordinance 81-5 allowed for construction, work, uses or activities, including those that involved grading, clearing, removal of vegetation, filling

or creation of land coverage – including land coverage in excess of the Bailey coefficients – so long as a permit was obtained. Permits for such activities were obtainable, provided that certain findings were made. In California, however, no coverage in excess of the Bailey coefficients was allowed. As on SEZ lands, however, the language of the ordinance indicates that *nothing* could be done without a permit. For Class 1-3 lands, however, this might have been somewhat modified by Ordinance 81-1, which provided for "minor grading" without a permit.

After the adoption of 81-5, which also implemented some details of the final 208 plan, TRPA turned its attention more completely to the task of developing threshold carrying capacities as mandated by the Compact. From the date Ordinance 81-5 was adopted, TRPA had approximately one year remaining under the Compact's schedule in which to develop carrying capacities. "Environmental threshold carrying capacity" was defined by the 1980 Compact as "an environmental standard necessary to maintain a significant scenic, recreational, educational, scientific or natural value of the region or to maintain public health and safety within the region." 1980 Compact, Article II(i). Faced with a complex task and a divided Governing Board, it is unsurprising that TRPA did not quite meet the Compact deadline of June 19, 1982. Instead, threshold carrying capacities were adopted on August 26, 1982, roughly two months behind schedule – which, given the circumstances, was not terrible. TRPA Resolution No. 82-11 (Defs.' Ex. 244).

Under a liberal reading of the Compact, TRPA then had one year from the adoption of the thresholds in which to adopt a new regional plan – or until August 26,

1983. Unfortunately, but again not surprisingly, no regional plan was in place as of that date. Worried that, once the Compact's time limit had been exceeded, TRPA had no jurisdiction to continue issuing construction permits, the agency took the second of the three actions challenged here – it adopted Resolution 83-21, which completely suspended all project reviews and approvals, including the acceptance of new proposals, for a period of ninety days, or until November 26, 1983. TRPA Resolution 83-21 (Defs.' Ex. 275). Since a permit was required for almost any use of Class 1-3 or SEZ lands at all, this moratorium essentially prohibited the commencement of any new use of such land. At the end of ninety days, the ban was extended – although not by any affirmative action by TRPA, and not, contrary to what the defendants have implied, for any set period of time. The Minutes of the TRPA Governing Board regular meeting held November 17, 1983, indicate that TRPA staff members advised the Board that the end of the ninety day period was approaching, and that, absent an order by the Board to the contrary, the staff would continue to observe the moratorium, since the conditions that had led to its imposition in the first place still existed. Defs.' Ex. 286. That is, there was still no regional plan. Since the Board never took any action in response to this "advice," the moratorium was, in fact, continued in effect by the staff.

Finally, however, on April 26, 1984, a new regional plan was adopted. TRPA Ordinance 84-1 (Defs.' Ex. 299). The temporary moratorium initiated by Resolution 83-21 thus ended up lasting approximately eight months. With respect to Class 1-3 and SEZ properties, however, not

much changed. The 1984 Plan provided, at least temporarily, that no projects proposing *any* land coverage at all in Class 1-3 and SEZ lands would be considered, with limited exceptions for "regional public facilities, public outdoor recreation facilities and public works projects." TRPA Ordinance 84-1, § 4.30(2) (Defs.' Ex. 299) (incorporating by reference the document entitled "Project Review Under Adopting Ordinance," dated March 28, 1984). This prohibition may or may not have been intended to become permanent, but the provisions relating to high hazard lands, as well as numerous other provisions, apparently still had not quite been agreed upon at the time Ordinance 84-1 was adopted, and temporary measures were enacted in the interim. *See, e.g.*, TRPA Ordinance 84-1, § 2.12 (the plan area statements were "adopted as an interim policy guideline, effective until September 1, 1984, unless otherwise provided . . . "). As part of these temporary measures, the provisions of Ordinance 81-5 for approving projects were continued in force.

But no further refinements to the 1984 Plan were ever made. The very day that the new regional plan was adopted, the State of California filed suit against TRPA to block the plan's implementation. The next day, April 27, an environmental group known as the League to Save Lake Tahoe also filed suit. Both actions were filed in the Eastern District of California, and were assigned to Judge Edward J. Garcia. On May 1, 1984, Judge Garcia issued an Order to Show Cause and Temporary Restraining Order, which prohibited TRPA from issuing any permits in the Tahoe Basin, or even accepting any new applications for

permits. Order to Show Cause and Temporary Restraining Order at 3, No. Civ. S-84-0561 EJG (E.D.Cal. May 1, 1984) (Defs.' Ex. 300). The Order set a hearing date of May 31, 1984, for arguments regarding the issuance of a Preliminary Injunction. The hearing was eventually pushed back to June 11, but the Preliminary Injunction was granted – on June 15, 1984. *People of State of Cal. ex rel. Van De Kamp v. Tahoe Reg'l Planning Agency*, No. Civ. S-84-0561 EJG, 1984 WL 6591 (E.D.Cal. June 15, 1984) (Defs.' Ex. 303). The court then issued its Order Granting Preliminary Injunction on August 9, 1984. Order Granting Prelim. Inj., No. Civ. S-84-0565 EJG (E.D.Cal. Aug.9, 1984) (Defs.' Ex. 314). The August 9 Order essentially adopted the terms of the T.R.O., except for the fact that a long list of specific exceptions (mostly for various government entities) was included. Eventually, the Preliminary Injunction was upheld by the Ninth Circuit. *People of State of Cal. ex rel. Van de Kamp v. Tahoe Reg'l Planning Agency*, 766 F.2d 1308 (9th Cir.1985). The injunction thus remained in force until a completely revised regional plan (the "1987 Plan") was adopted in 1987.

Also shortly after the 1984 Plan was adopted, on June 25, 1984, TRPA faced another legal challenge to the 1984 Plan – that is, the instant case. Or rather, cases. Originally, those plaintiffs owning property on the Nevada side of the Tahoe Basin filed suit in this Court, No. CV-N-84-257-ECR, and those plaintiffs owning property on the California side of the Basin filed an action in the Eastern District of California, which again was assigned to Judge Garcia, No. Civ. S-84-816 EJG. After proceeding separately for years, the California case was transferred to this Court, and the two actions were consolidated here. Order, No.

CV-N-84-257-ECR (Feb. 21, 1992) (Doc. # 132). Initially, the complaints asserted claims against TRPA, the states of Nevada and California, and the individual members of TRPA's Governing Board, for declaratory and injunctive relief for due process and equal protection violations, and damages for violations of the takings clause. In addition, the complaint stated a claim for violations of the Civil Rights Act, 42 U.S.C. §§ 1983 and 1985, as well as what is commonly known as a "Furey" claim – that is, a claim that the plaintiffs had been forced to pay certain assessments on their land, but had not been able to enjoy the benefits of the public improvements those assessments funded (such as sewer service, etc.), since they were unable to build on their land. *Furey v. City of Sacramento*, 592 F.Supp. 463 (E.D.Cal.1984), *aff'd*, 780 F.2d 1448 (9th Cir.1986).

Both in the complaints and throughout this litigation, the plaintiffs have been grouped by "class," according to the land capability district of each plaintiff's land. "Class 1-3" plaintiffs and "SEZ" plaintiffs are grouped separately. Once the cases were consolidated, the plaintiffs were further grouped by state. Thus there are four groups of plaintiffs now before the Court: Nevada-side Class 1-3 plaintiffs; Nevada-side SEZ plaintiffs; California-side Class 1-3 plaintiffs; and California-side SEZ plaintiffs. The claims of these plaintiffs have also been divided – by time period, according to the effective dates of the various ordinances and other actions challenged herein: "Period I" covers August 24, 1981, to August 26, 1983; "Period II" covers August 27, 1983, to April 25, 1984; and "Period III" covers April 26, 1984, to July 1, 1987.

In the first round of district court decisions in the mid-1980s, both this Court and the Eastern District of California dismissed all of the plaintiffs' claims. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 611 F.Supp. 110 (D.Nev.1985); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 638 F.Supp. 126 (D.Nev.1986); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, Memorandum and Order, No. Civ. S-84-816 EJG (E.D.Cal. Jan. 22, 1985); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, Memorandum of Decision and Order Granting Summ. J., No. Civ. S-84-816 EJG (E.D.Cal. Mar. 27, 1987). Both district courts were then reversed in part and affirmed in part by the Ninth Circuit. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 911 F.2d 1331 (9th Cir.1990) (*"TSPC I"*) (reviewing the District of Nevada case); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 938 F.2d 153 (9th Cir.1991) (*"TSPC II"*) (reviewing the Eastern District of California case).

In *TSPC I*, the Ninth Circuit held that all claims for declaratory and injunctive relief were moot, as the 1984 Plan had been replaced in the interim by the 1987 Plan. Further, all claims for money damages against Nevada and California were dismissed on immunity grounds. The court followed these holdings in *TSPC II*. In the Nevada case, the Ninth Circuit held that all of the plaintiffs' Period III takings and § 1983 claims against TRPA were unripe, and that the Period I takings and § 1983 claims of the Class 1-3 plaintiffs against TRPA were also unripe. In the California case, however, the Ninth Circuit held that

all of the plaintiffs' takings and § 1983 claims against TRPA were ripe.

On remand, the cases were consolidated in this Court. We allowed the plaintiffs to amend their complaints, and in doing so, the plaintiffs added claims against the 1987 Regional Plan. We again dismissed all of the plaintiffs' claims: the Period I and Period II claims on statute of limitations grounds; the Period III claims for lack of causation; and the new claims against the 1987 Plan because they had not been properly joined, were unripe, and were time-barred. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 808 F.Supp. 1474 (D.Nev.1992) (Nevada case); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 808 F.Supp. 1484 (D.Nev.1992) (California case). In addition, we dismissed the *Furey* claims, which had been remanded to us for a determination of whether any assessments had been paid to TRPA (as opposed to other local agencies), because we found that no such payments had in fact been made to TRPA.

Again, the Ninth Circuit reversed in part. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 34 F.3d 753 (9th Cir.1994) (*"TSPC III"*), *amended by* 42 F.3d 1306 (9th Cir.1994). The court held that the plaintiffs' takings claims as to Periods I and II were barred by the statute of limitations, but that their § 1983 claims as to the same periods were not time-barred. Further, the court held that the plaintiffs' § 1983 claims as to the 1987 Plan were not barred by the 60-day statute of limitations contained in the Compact. Finally, the court remanded the

plaintiffs' Period III claims for the trier of fact to determine whether or not those claims were caused by the actions of TRPA.

Subsequent to the most recent remand, we held that the plaintiffs' § 1983 claims as to the 1987 Plan, while not barred by the 60-day Compact statute of limitations, were nonetheless barred by the appropriate § 1983 statutes of limitations in both Nevada and California. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 992 F.Supp. 1218 (D.Nev.1998). Thus the recent trial, held December 1-16, 1998, only addressed the following claims: the Period I § 1983 claims of all the California plaintiffs, as well as of the Nevada SEZ plaintiffs; the Period II § 1983 claims of all the plaintiffs; and the Period III claims of the California plaintiffs. (Although by now it is clear that the plaintiffs could not bring separate "takings" claims apart from their § 1983 claims, as to the 1984 Plan both sets of claims are technically still in the case. Nonetheless, separate relief for the two sets of claims is not available.)

Further, it should be noted that we had previously ordered the trial to be bifurcated into two phases: the first phase was to establish whether the plaintiffs were entitled to compensation for any of their claims; the second (to take place only if TRPA were found liable on any claims) was to determine how much compensation the plaintiffs were owed. The recent trial encompassed only the first phase.

At trial, several witnesses testified as to the scientific basis for the findings, discussed above, that the increase in impervious land coverage in the Basin, especially in

high hazard lands, causes a corresponding increase in sediment runoff into the lake, and the subsequent eutrophication thereof. The testimony of Dr. Goldman was especially persuasive. Dr. Goldman, one of the country's leading limnologists, has been studying Lake Tahoe for almost forty years, and has personally recorded data regarding its loss of clarity. In general, we find the scientific evidence presented by the defendants to be credible.

One area that was heavily contested at trial, however, involved the testimony of two expert witnesses, one called by each side, on the subject of appraising the value of high hazard lands during the period at issue, and whether a "competitive market" for such land existed between 1981-1987 or any portion thereof. Since the resolution of this question resolves one of the major issues in the case, we will discuss it in more detail together with our discussion of the legal questions involved, infra.

CONCLUSIONS OF LAW

I. REGULATORY TAKINGS

All of the remaining claims in this case were brought under 42 U.S.C. § 1983, alleging violations of the Takings Clause of the Fifth Amendment to the United States Constitution.[2] The Takings Clause provides as follows: "nor

---

[2] Actually, the plaintiffs' "pure" takings claims against TRPA as to the 1984 Plan have not technically been dismissed from the case, but it is clear by now that all claims against government actors for constitutional violations must be brought under 42 U.S.C. § 1983. *Azul-Pacifico, Inc. v. Los Angeles*, 973 F.2d 704, 705 (9th Cir.1992). There is no separate relief available for a "pure" takings claim.

shall private property be taken for public use, without just compensation." U.S. Const. amend. V. Of course, the Takings Clause is applicable to the States through the Fourteenth Amendment. *Dolan v. City of Tigard*, 512 U.S. 374, 383, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994). Technically speaking, TRPA is not a state or even a subdivision of a state – it is a separate legal entity, created by the Compact. Compact, Article III(a). Nonetheless, TRPA is clearly liable for damages for such violations. *TSPC I*, 911 F.2d 1331, 1341 (9th Cir.1990).

The Takings Clause can be violated either by direct government appropriation of property without just compensation, or by government regulation that interferes with a property owner's use of her property to the extent that it accomplishes nearly the same result as a direct appropriation. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). "[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 67 L.Ed. 322 (1922).

A. Do TRPA's Actions "Substantially Advance a Legitimate State Interest"?

The instant case does not involve any allegations of direct appropriations of land by TRPA. All of the claims are of the "regulatory takings" variety. Government regulation will constitute a taking when either: (1) it does not substantially advance a legitimate state interest; or (2) it denies the owner economically viable use of her land.

Agins v. City of Tiburon, 447 U.S. 255, 260, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980).

As to the first of these possibilities, there is as yet no clear test for determining whether a regulation substantially advances a legitimate state interest – at least in the type of situation involved here. First, though, it is clear that the "interest" being advanced must be "legitimate." We suppose an argument could conceivably be made that preventing the eutrophication of Lake Tahoe is not a legitimate interest for the government to pursue at all, but no one in this case has made that argument. Nor do we think that such an argument would ever be successful. Besides the intrinsic value of preserving the environment from degradation and destruction, the beauty of Lake Tahoe is largely responsible for driving the economy of the region, which is based almost entirely on tourism. Thus the main question to be resolved here is not whether the state interest is "legitimate," but whether TRPA's actions "substantially advanced" that interest.

The Supreme Court has developed a test to make this determination in its "unconstitutional exactions" cases, *Dolan v. City of Tigard* and *Nollan v. California Coastal Comm'n* – the "essential nexus"/"rough proportionality" test. That is, first it must be determined "whether the 'essential nexus' exists between the 'legitimate state interest' and the permit condition exacted by the city," *Dolan*, 512 U.S. at 386, 114 S.Ct. 2309 (citing *Nollan*, 483 U.S. 825, 837, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987)), and then whether some "rough proportionality" exists between the condition exacted and the "impact of the proposed development." *Id.* at 390-91, 114 S.Ct. 2309. Aside from one footnote in *Dolan*, these cases do not really indicate

whether this test should also be applied to situations in which no concession is being sought by the government in return for the grant of a permit to a specific individual. The relevant footnote states only the following: while in regard to individualized, adjudicative, permit conditions the burden of proof is on the government, "in evaluating most generally applicable zoning regulations, the burden is on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights." *Id.* at 391 n. 8, 114 S.Ct. 2309.

However, the Ninth Circuit has indicated that this test may not be limited to cases involving exactions. In *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422 (1996) ("*Del Monte Dunes*"), *reh'g granted*, 118 F.3d 660, *reh'g en banc denied*, 127 F.3d 1149 (9th Cir.1997), *cert. granted*, ___ U.S. ___, 118 S.Ct. 1359, 140 L.Ed.2d 509 (1998), the court applied the "rough proportionality" test to a case in which nothing was exacted – the permit was simply denied. *Id.* at 1430 (holding that "[s]ignificant evidence supports Del Monte's claim that the City's actions were disproportional to both the nature and extent of the impact of the proposed development"). More recently, though, the court held that the *Dolan/Nollan* analytical framework does not apply at all to *facial* challenges such as this one. *Garneau v. City of Seattle*, 147 F.3d 802, 811 (9th Cir.1998). Unfortunately, however, there is no majority opinion in *Garneau*, so the case is of limited precedential value. If *Garneau* is correct, then the "rough proportionality" test would not apply here – but there is no indication of what other test should then be applied instead.

Given that any other possible test would most likely be less stringent than the rough proportionality test (such as, perhaps, the *Dolan* footnote's statement that the regulation must not be "arbitrary"), it seems clear that TRPA's actions do "substantially advance a legitimate state interest." For the actions in question satisfy even the rough proportionality test. The evidence is quite convincing that further development on high hazard lands such as the plaintiffs' would lead to significant additional damage to the lake. Thus, limiting such development unquestionably satisfies the "essential nexus" part of the test. There is a direct connection between the potential development of plaintiffs' lands and the harm the lake would suffer as a result thereof. Further, there has been no suggestion by the plaintiffs that any less severe response would have adequately addressed the problems the lake was facing. Thus it is difficult to see how a more proportional response could have been adopted. Given that TRPA's actions had wide-spread application, and were not aimed at an individual landowner, the plaintiffs would appear to bear the burden of proof on this point. *Dolan*, 512 U.S. at 391 n. 8, 114 S.Ct. 2309. They have not met this burden – nor have they really attempted to do so. Although unwilling to *stipulate* to the fact that TRPA's actions substantially advanced a legitimate state interest, the plaintiffs did not seriously contest the matter at trial.

B. Do TRPA's Actions Deny the Plaintiffs "Economically Viable Use" of Their Property?

As the challenged actions of TRPA therefore clearly do "substantially advance legitimate state interests," the question to be answered next is whether those actions

deprived the plaintiffs of "economically viable use" of their property. If TRPA's actions deprived the plaintiffs of *all* economically viable use of their land, as opposed to just *some* such use, then those actions would constitute what have been referred to as "categorical" takings, with no further inquiry necessary.[3] *Lucas*, 505 U.S. at 1015, 112 S.Ct. 2886. On the other hand, if TRPA's actions deprived the plaintiffs of *some*, but not *all*, economically viable use of their land, then TRPA's actions must be analyzed under the "essentially ad hoc, factual inquir[y]" of *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978) ("*Penn Central*"). Under the *Penn Central* test, a regulation may or may not effect a taking, depending on: (1) "the economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct, investment-backed expectations"; and (3) "the character of the governmental action." *Id.*

At least one of these "tests" will apply, however – that is, either the *Lucas* "categorical takings" rule, or the *Penn Central* ad hoc balancing test. In other words, it is clear that TRPA's actions did deny the plaintiffs at least some economically viable uses of their land. The question which remains to be answered – and which was hotly

---

[3] Of course, this sort of categorical treatment is also accorded to regulations which require a property owner to suffer actual physical invasion of her land. *Lucas*, 505 U.S. at 1015, 112 S.Ct. 2886. This is true no matter how minute that invasion may be. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982). However, no such physical invasion is alleged to have occurred here.

debated at trial – is whether the denial was total, or only partial. This question is important because the answer effectively decides the outcome of the case.

1. Did TRPA's Actions Effect a "Partial Taking" of the Plaintiffs' Property?

If we were to hold that TRPA's actions effected only a partial denial of economically viable use, then consideration of the *Penn Central* factors clearly leads to the conclusion that there was no taking. Given the temporary nature of the regulations at issue here, we cannot say that the plaintiffs' reasonable, investment-backed expectations were unduly interfered with. *Dodd v. Hood River County*, 136 F.3d 1219, 1230 (9th Cir.), *cert. denied*, ___ U.S. ___, 119 S.Ct. 278, 142 L.Ed.2d 229 (1998). Mr. Johnson, the defendants' appraiser, testified that the average holding time of a lot in the Tahoe area between lot purchase and home construction is twenty-five years. If the average purchaser expects to hold a lot for twenty-five years before building on it, then a delay of six years in being able to build would not be an interference with that purchaser's expectations at all. We recognize, of course, that some of the individual plaintiffs herein may conceivably have held their properties for almost twenty-five years by the time the restrictions on construction at issue were imposed, or may have intended to build immediately. We have no way of knowing this, since no information regarding any of the individual plaintiffs was presented at trial. Thus we must rely on testimony as to the "average" purchaser's intent. Besides, the fact that some plaintiffs may have already held their property for a long period of time would not exactly weigh in their favor. It

would certainly show that they did not intend to build immediately upon purchase. Further, they would have had plenty of time to build before the restrictions went into effect – and almost everyone in the Tahoe Basin knew in the late 1970s that a crackdown on development was in the works. The Tahoe area experienced a glut of construction in the years just before the Compact was amended in 1980, as worried property owners attempted to build while they still could. On the other hand, if some individual plaintiffs in this action acquired their property more recently than twenty-five years before the restrictions were imposed, then their expected holding time may not have been affected at all.

The facts were somewhat similar in *Dodd*, in which the Ninth Circuit found that the plaintiffs' reasonable, investment-backed expectations had not been interfered with. In *Dodd*, the plaintiffs had purchased land in 1984, but waited until 1990 to file for the necessary permit to build. For six more years, it appeared that no such permit would be granted, but in 1996 it was. However, the plaintiffs had still not commenced building by 1998, when the Ninth Circuit heard their case. The court found that the self-imposed delay in building their retirement home weighed heavily against the idea that their reasonable, investment-backed expectations had been foiled by the six-year delay they suffered as a result of the permit process. *Dodd*, 136 F.3d at 1230. Thus, we hold that, like the plaintiffs in *Dodd*, the plaintiffs in our case did not have reasonable, investment-backed expectations that they would be able to build single-family homes on their land within the six-year period involved in this lawsuit.

This factor therefore weighs against a finding that TRPA's action effected a partial taking of the plaintiffs' property.

The fact that no information on individual plaintiffs was introduced at trial also affects our ability to analyze the first of the *Penn Central* factors – that is, the economic impact of TRPA's actions on the plaintiffs. Since the burden is on the plaintiffs to show that a taking occurred (and since that burden is especially heavy in a facial challenge such as this), the fact that they agreed not to introduce this type of evidence works against them. The fact that it is a facial challenge does not mean that all evidence relating to individual plaintiffs is irrelevant at this stage. *See Garneau*, 147 F.3d at 807-08 (engaging in "ad hoc, factual inquiry appropriate in non-categorical regulatory takings cases" in acknowledged "facial" case). It may be that the instant plaintiffs could have produced evidence of this type, but they clearly chose not to do so. We assume that this was a result of a calculated choice by plaintiffs' counsel to concentrate on the plaintiffs' main contention, that TRPA's actions resulted in a categorical taking, and not a partial taking. Regardless, the fact that no evidence was introduced regarding the specific diminution in value of any of the plaintiffs' individual properties clearly weighs against a finding that there was a partial taking of the plaintiffs' property.

The third of the *Penn Central* factors, that of "the character of the governmental action," also weighs against a finding that there was a partial taking of the plaintiffs' property. As discussed above, the scientific evidence convincingly shows that Lake Tahoe was losing its clarity due to increased development in the Basin,

especially in high hazard lands. Thus limiting development on high hazard lands is a direct and reasonable way to combat the problem. Faced with the responsibility for solving a serious problem, TRPA took the necessary steps to do so. While those steps may have had a more substantial impact on the plaintiffs than on others in the Basin, the plaintiffs were not completely deprived of their land, and they retained many important rights of property ownership, such as the right to exclude others from their own land. *See Penn Central,* 438 U.S. at 124, 98 S.Ct. 2646 ("A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government [citation omitted], than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.").

Thus with all three of the *Penn Central* factors, at least to some extent, weighing against a finding that TRPA's actions constituted a partial taking, we clearly must hold that anything less than a total denial of all economically viable use of the plaintiffs' property would not constitute a taking. Since the *Penn Central* test is essentially a balancing test – "a weighing of private and public interests," *Dodd,* 136 F.3d at 1229 (citing *Agins,* 447 U.S. at 261, 100 S.Ct. 2138) – and since the interest in protecting Lake Tahoe is so strong, any test that takes that interest into account would result in victory for the defendants. However, if the plaintiffs were deprived of all economically viable use of their property, then the interest in protecting Lake Tahoe is not taken into account. No matter how noble the goal of protecting the lake, and no matter how necessary the steps taken were to achieving that goal, the

plaintiffs would be entitled to just compensation from TRPA. "It is axiomatic that the Fifth Amendment's just compensation provision is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' " *First English Evangelical Lutheran Church of Glendale v. Los Angeles County,* 482 U.S. 304, 318-319, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987) (*"First English"*) (quoting *Armstrong v. United States,* 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960)).

2. Did TRPA's Actions Effect a "Total Taking" of the Plaintiffs' Property?

The most important question we must decide, then, is whether the plaintiffs have indeed been deprived of all economically viable use of their land. Thus, we must first decide *how* to answer that question. At trial, the defendants argued, essentially, that property that has been deprived of all economically viable use will be rendered completely "valueless," so that property with any remaining value, by definition, must have some remaining economically viable use. The plaintiffs, on the other hand, argued that the "value" of property is utterly irrelevant to the determination of whether any viable uses of that property remain, and even moved to exclude all evidence of value at trial. Pls.' Mot. in Limine (Oct. 30, 1998) (Doc. # 289). Both of these contentions are meritless. "Value" is unquestionably relevant to the issue of whether there has been a taking. The Ninth Circuit explicitly recognized this in *Del Monte Dunes,* 95 F.3d at 1433. The only case to which the plaintiffs point for support of their argument that "value" is irrelevant is

Lucas, which certainly does contain language stressing the importance of "use." But *Lucas* clearly relied on the lower court's finding that the regulations at issue had in fact rendered the plaintiff's property "valueless." *Lucas*, 505 U.S. at 1020 n. 9, 112 S.Ct. 2886. Thus *Lucas* could just as easily be read to support the defendants' contention that value is "everything" as the plaintiffs' contention that value is "nothing." In truth, however, *Lucas* supports neither of these extremes. It was clearly important to the Court that the property had been rendered "valueless"; likewise, however, it was also important that *Lucas* could not "use" his property in any "economically beneficial or productive" fashion. *Lucas*, 505 U.S. at 1015, 112 S.Ct. 2886. In any event, regardless of how *Lucas* could be read, the Ninth Circuit has essentially resolved the issue for us. In *Del Monte Dunes*, the court explicitly held that value, while clearly relevant, was not the main focus of the economically viable use inquiry. *Del Monte Dunes*, 95 F.3d at 1433. The court further held that proof that a property retains some value is not sufficient to prove that the property retains some economically viable use. *Id.* at 1432-33.

This holding is key to our case, because it is clear that the plaintiffs' properties – no matter how restricted their use-did retain some value during the period at issue. The defendants' appraiser, Mr. Johnson, testified to the fact that during the period at issue, some sales of Class 1-3 and SEZ properties did take place. Further, his testimony supports the proposition that all land in the Tahoe Basin has, and has always had, *some* value, no matter how limited its uses. In some instances that value may be

minimal, but none of the land is completely "valueless," as was the case in *Lucas*.

As we have seen, however, the fact that the land had some value is not sufficient. The land must retain some "economically beneficial or productive use." Of course, there is some connection between the two concepts. To a large extent, land will only have significant value if there is some use to which it can be put – for as the Supreme Court has recognized, "[w]hat is the land but the profits thereof?" *Lucas*, 505 U.S. at 1017, 112 S.Ct. 2886 (citations omitted). As for what constitutes an economically "viable," "beneficial," or "productive" use, the Ninth Circuit has held that a "use" of property is economically viable when a competitive market exists for the property as subject to the use restrictions imposed by the regulations at issue. *Del Monte Dunes*, 95 F.3d at 1433. That is, a permitted use is economically viable when a sufficient number of people would be willing to buy the property for that use, whatever it might be, to make the property "commercially marketable." *Id.* at 1434. The fact that the permitted use might not be the one to which the current owner wanted to put the property does not matter. *See Dodd*, 136 F.3d at 1228-30 (fact that property could be used for "timber production" was considered economically viable use, even though the plaintiffs wanted to build a retirement home). As long as there is some type of competitive market for the land for its permitted use, than the use would appear to be an "economically viable" one.

However, if there is only one willing buyer, there would not, by definition, appear to be a "competitive" market. *See Del Monte Dunes*, 95 F.3d at 1432-33. Thus the

fact that someone, such as the government or an environmental group, may be willing to pay for land that can only be "used" in its natural state does not necessarily mean that the "use" of leaving the property in its natural state is an "economically viable" one.

It is important, therefore, to determine just what "uses," if any, the plaintiffs could make of their property, as well as whether any of those uses were economically viable – i.e., whether a competitive market existed for the land if put to that use. At trial, therefore, a substantial amount of time was spent examining the potential uses to which the plaintiffs' land could or could not have been put under the regulatory system in place in the Basin during the time periods at issue. To this end, the parties discussed houses, toolsheds, vegetable gardens, dog runs, kennels, corrals, barns, hiking trails, parking lots, greenhouses, driveways, treehouses, gazebos, tennis courts, swimming pools, golf courses, picnic facilities, camp grounds, farms, pumpkin patches, berry fields, other small agricultural endeavors, boat repair and storage facilities, jungle gyms, soccer fields, baseball diamonds, timber production, and a variety of other "uses" to which land in general, and the plaintiffs' land in particular, could conceivably be put. Whether any of these uses were permissible at all depends largely on the wording of TRPA's ordinances.

a. Did Ordinance 81-5 Deprive the Plaintiffs of All Economically Viable Uses of Their Property?

First, under 81-5, no use or activity could be conducted on SEZ lands without a permit, and no permit would be granted if the proposed activity involved grading, clearing, removal of vegetation, filling or creation of land coverage. Of the uses listed above, very few would appear to be possible without involving some clearing, grading, removal of vegetation, etc. Unlike Class 1-3 property owners, SEZ owners could not avail themselves even of the exemption for "minor grading" provided in Ordinance 81-1. TRPA Ordinance 81-1, §§ 2.00, 3.8(1). It does appear that a few "uses" may have been available to SEZ owners, but it is highly doubtful that any of these uses could ever be considered economically viable.

Nonetheless, we have considered the evidenced [sic] offered by the defendants to prove that such uses were in fact economically viable – that is, the testimony of Mr. Johnson. Mr. Johnson, a respected appraiser with a practice based in the Tahoe Basin, testified that sales of SEZ property did take place during the period at issue. Specifically, he referred to six sales and one offer in a period stretching from June 11, 1981, to January 5, 1990. One of these took place shortly before Ordinance 81-5 was enacted; another sale, as well as the offer, took place within the period of time 81-5 was effective. *See* Defs.' Ex. 32. He further testified that this sampling of sales was only "representative," and that in his opinion other sales of SEZ lands probably occurred in that time frame. Unfortunately, we cannot conclude that one actual sale, even if

considered "representative," demonstrates that a "competitive market" for such land existed, as the Ninth Circuit requires – especially given that somewhere in the neighborhood of 8000 to 9000 undeveloped lots existed in the Basin at the time. Mr. Johnson's testimony also supports the idea that, if there were sales, almost all of them were probably to a neighbor looking to protect a view, or enlarge his own lot, or for similar reasons. If the only potential purchaser of a given lot is a neighbor, that does not necessarily suggest a "competitive" market. A single purchaser will not usually have any "competition" for the land. Even the sales of which there is evidence seem generally to have been made for relatively low prices, which also suggests that demand for such properties was extremely low.

As for Class 1-3 properties, the analysis is similar, although only California properties are still at issue with respect to Ordinance 81-5. The claims of the Nevada-side Class 1-3 plaintiffs as to Ordinance 81-5 were dismissed by this Court as unripe in 1986, *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency,* 638 F.Supp. 126, 133 (D.Nev.1986), due to the existence of the so-called "case-by-case" exception. The dismissal of these claims was upheld by the Ninth Circuit in *TSPC I,* 911 F.2d 1331, 1339 (9th Cir.1990). Mr. Johnson testified that there were sales of Class 1-3 properties in California during the relevant time period, but again could only point to a few examples. Defs.' Ex. 78a. In fact, none of the offered examples actually occurred during the period Ordinance 81-5 was in effect, although two of them took place in the months prior to its enactment. Since the Ordinance 81-5 provisions as to California land actually

went into effect on an earlier date in California, the effect is no doubt the same. Again, however, those few sales do not convince us that a competitive market for such land existed.

It is true that more "uses" were permissible for Class 1-3 properties, even in California, than for SEZ properties generally. These uses included "outdoor recreation facilities," and uses involving "minor grading" – provided no land coverage in excess of the Bailey coefficients was created. Thus while a few more uses, such as a garden, may have been permissible and even feasible, they do not appear to be any more "economically viable" than those permitted even on SEZ lands, such as hiking. While in theory some "outdoor recreation facilities" might be economically viable in certain conditions, we have assumed throughout this litigation that those conditions are not present on the plaintiffs' lands. For instance, golf courses, ski facilities, and even campgrounds may sometimes be quite profitable – but not on a lot intended for the building of a single-family home, surrounded by lots on which other single-family homes have already been built. We have been led to assume throughout this case that the plaintiffs all own single-family lots that would not be capable of supporting uses such as golf courses, ski facilities, or campgrounds (even assuming such facilities could be built without exceeding the coverage limitations). An average-size, single-family lot, at around 10,000 square feet, just is not large enough for any of these activities. We note, however, that some plaintiffs do own more than one lot. Should it prove to be true that any plaintiff owns two or more *contiguous* lots which together might be

suitable for any "economically viable" "outdoor recreation facility"-type uses, we would need to reexamine this issue with respect to those plaintiffs. The fact that a plaintiff may own two or more *non*-contiguous lots is irrelevant – each lot is considered separately. Only lots that might be combined to form one, larger lot will be subject to any possible reconsideration on this point. In addition, we note that we have also always assumed that none of the plaintiffs' land was in either "approved subdivisions" or "man-modified areas," either of which would, if true for an individual plaintiff, make that plaintiff unable to prove that Ordinance 81-5, on its face, effected a taking of her property.

Thus, we are forced to conclude that Ordinance 81-5 did in fact deny the plaintiffs all economically viable use of their land. Unless the defendants prevail on one of the two "affirmative defenses" they have advanced, which will be discussed below, it is clear that Ordinance 81-5 effected a taking of the plaintiffs' property, and that the plaintiffs are therefore entitled to compensation for the period between August 24, 1981, and August 26, 1983. That is, those plaintiffs whose Period 1 claims have not already been dismissed are entitled to compensation for this period. Those plaintiffs owning Class 1, 2, or 3 land on the Nevada side of the Tahoe Basin are not entitled to compensation for this period. All other plaintiffs – i.e., Nevada-side SEZ plaintiffs and California-side Class 1, 2, 3, and SEZ plaintiffs – are entitled to compensation – assuming, of course, that none of these plaintiffs own two or more contiguous lots capable of being combined into a useful larger lot, or lots in "man-modified areas," or "approved subdivisions." Therefore, when we reach the

damages phase of the trial, the defendants will be allowed to present evidence going to show that these assumptions are not valid with respect to any individual plaintiffs' lot.

b. Did Resolution 83-21 Deprive the Plaintiffs of *All* Economically Viable Use of Their Property?

During the second time period, under Resolution 83-21, uses were even more restricted. Resolution 83-21 suspended all permit approvals – and it appears that basically any use of either Class 1-3 or SEZ lands required a permit. Without permits, therefore, no uses were really permissible. It is possible that Class 1-3 owners might have been able to conduct some "minor grading" on their property without getting a permit, since Ordinance 81-1 had defined "minor grading" as "not a project." TRPA Ordinance 81-1, §§ 2.00, 3.80(1). However, as discussed above, there is no evidence that the ability to conduct "minor grading" would have enabled the plaintiffs to "use" their property for anything much more "economically beneficial" than if they were not allowed to conduct minor grading. The evidence does not support a finding that there was a competitive market for high hazard land while 83-21 was in force. Again, therefore, we are forced to conclude that Resolution 83-21 denied the plaintiffs all economically viable use of their land. Barring success by the defendants in either their "nuisance" or "temporary takings" arguments, Resolution 83-21 is a taking, and the plaintiffs are entitled to compensation for the period from August 27, 1983, to April 25, 1984. For this period, all

plaintiffs, on both sides of the Basin, are entitled to compensation.

c. Did the 1984 Plan Deprive the Plaintiffs of All Economically Viable Use of Their Property?

The foregoing analysis assumes, of course, that TRPA's actions actually caused the plaintiffs' injuries. With respect to Ordinances 81-5 and Resolution 83-21, no one ever challenged that this was indeed the case. Nor could they – it is clear that TRPA's actions were the cause of the plaintiffs' damages. In fact, in most regulatory takings cases, there is never any doubt about whether the government's actions caused the plaintiff's injuries. With respect to the third and final of TRPA's actions challenged here, however, the issue of causation has been hotly debated. The defendants claim that, with respect to the 1984 Plan, the plaintiffs' injuries were actually caused by the injunction issued by Judge Garcia in the litigation brought by the state of California and the League to Save Lake Tahoe.

There is very little discussion of the "causation" issue in any of the case law involving regulatory takings. However, it is clear that the cases implicitly assume that the challenged government action must be both the cause in fact and the proximate cause of the plaintiff's injuries. In addition to the few regulatory takings cases that do explicitly reflect this view, this is also supported by other (i.e., non-regulatory) takings cases, and by other types of § 1983 cases.

First, in *Penn Central*, the Supreme Court mentioned almost in passing that "whether a particular restriction will be rendered invalid by the government's failure to pay for any losses *proximately caused* by it depends largely 'upon the particular circumstances [in that] case.' " 438 U.S. at 124, 98 S.Ct. 2646 (quoting *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168, 78 S.Ct. 1097, 2 L.Ed.2d 1228 (1958)) (emphasis added) (alteration in original). The Court of Federal Claims has held that the "burden of plaintiff is to show that 'but for' the federal government's action they would have been able to realize their plans for the property allegedly taken." *Bowles v. United States*, 31 Fed. Cl. 37, 49 (1994). Earlier, the Claims Court had held that "[b]efore a court will find a compensable taking, it must be additionally satisfied that 1) plaintiff's loss was directly and proximately caused by governmental action." *Johns-Manville Corp. v. United States*, 12 Cl.Ct. 1, 34 (1987). *Cf. Wheeler v. City of Pleasant Grove*, 833 F.2d 267, 269 (11th Cir.1987) (reversing district court's decision that "the implementation of Ordinance No. 216 had not proximately caused any compensable injury to the plaintiffs").

Further, in one specific line of non-regulatory takings cases, involving flooding caused by federal government action in making improvements to navigable waters, several courts have explicitly held that the government action must be the "direct and proximate cause" of the property owner's damages in order to constitute a taking. *E.g., Loesch v. United States*, 227 Ct.Cl. 34, 645 F.2d 905, 913 (1981) (holding that "if there is no proper showing that governmental action was the proximate and direct cause of the erosion damage, there can be no liability for a fifth

amendment taking"); *Rhoads v. United States*, 6 Cl.Ct. 278, 279-80 (1984), *aff'd mem*, 770 F.2d 182 (Fed.Cir.1985) (holding that "[p]laintiffs must prove by a preponderance of the evidence that the construction and operation of the navigation dam in issue were the direct and proximate cause of the erosion damages suffered by them on their riparian banks").

Finally, other § 1983 cases unquestionably hold that causation is an element of the claim. *Arnold v. IBM Corp.*, 637 F.2d 1350, 1355 (9th Cir.1981):

> Causation is a concept that is not often discussed or explicitly stated in civil rights cases . . . . Although causation is not stated explicitly in these formulations, it is an implicit requirement. . . .
>
> The causation requirement of sections 1983 and 1985 is not satisfied by a showing of mere causation in fact. . . . Rather, the plaintiff must establish proximate or legal causation. . . .
>
> . . . The standard for causation . . . is more than that of causation in fact. [It] closely resembles the standard "foreseeability" formulation of proximate cause. . . .

Id. See also, Coral Constr. Co. v. King County, 941 F.2d 910, 926 (9th Cir.1991) (holding that "like section 1983, section 1981 is by nature a tort remedy. . . . Accordingly, it follows that causation is also an element of a section 1981 cause of action."); *Wright v. City of Reno*, 533 F.Supp. 58, 64 (D.Nev.1981) (stating that the "causation requirement, of both §§ 1983 and 1985, is not satisfied by a showing of mere causation in fact; rather, the plaintiff must establish proximate or legal causation"). Only one case seems to

have addressed the issue in the context of a takings claim brought as a § 1983 claim: "To establish a takings claim under 42 U.S.C. § 1983, [the plaintiff] must show (1) a property interest; (2) that has been taken under the color of state law; (3) without just compensation. [citation omitted]. In addition, in order for liability to attach to a municipality, such as the County, a plaintiff must show that it was an official policy or custom or practice that *proximately caused* the constitutional violation." *HBP Assocs. v. Marsh*, 893 F.Supp. 271, 277 (S.D.N.Y.1995) (emphasis added).

However, while it is clear that TRPA's actions must have been the "proximate cause" of the plaintiffs' damages in order for liability to attach, it is not clear just what constitutes "proximate cause." Tort claims are generally governed by state law, not federal, but that cannot be true here, since we are actually faced with a question of federal constitutional law. There is no real federal law of torts, and even if there were, it would not necessarily apply. The issue here is not really analogous to a negligence claim at all. First, both TRPA and Judge Garcia acted intentionally, not negligently – but obviously neither acted maliciously or with criminal intent, so common-law intentional torts are not strictly analogous either. One common test is the "but for" test, which the Court of Federal Claims seems to have adopted in the takings area. *Bowles*, 31 Fed. Cl. at 49. If we adopt the Court of Federal Claims' formulation – that is, that the plaintiffs must prove that "but for" TRPA's action they would have been able to develop their property – then TRPA clearly did not cause the plaintiffs' injuries, at least with regard to any harm they may have suffered after

May 1, 1984. The 1984 Plan, as enacted, was not strict enough for California, the League to Save Lake Tahoe, Judge Garcia, or the Ninth Circuit. Clearly, had TRPA enacted a less stringent plan – i.e., one that allowed the plaintiffs to build on their Class 1-3 and SEZ properties – the injunction would still have issued barring TRPA from granting any permits or even accepting any applications.

It has often been stated in regulatory takings cases involving temporary takings that the government retains a choice once a regulation has been proven to effect a taking – either to retain the regulation in force and pay just compensation for the total value of the property, or to repeal the regulation and only face damages for the temporary period in which the regulation was enforced. The Supreme Court has been careful not to allow property owners to be able to "force" the government to exercise its power of eminent domain. *First English*, 482 U.S. at 317, 107 S.Ct. 2378 ("The Court has recognized in more than one case that the government may elect to abandon its intrusion or discontinue regulations. [citations omitted]. Similarly, a governmental body may acquiesce in a judicial declaration that one of its ordinances has effected an unconstitutional taking of property; the landowner has no right under the Just Compensation Clause to insist that a "temporary" taking be deemed a permanent taking."). In a sense, that is exactly what the injunction did in this case. Of course, the injunction ultimately proved temporary as well, but it deprived TRPA of the ability to change its mind, so to speak, in the interim, and allow the plaintiffs to begin building. In addition, there is language in Ordinance 84-1 that suggests that, at least with respect to Class 1-3 lands, the agency might eventually develop a

screening system that would allow some of those property owners to build. TRPA Ordinance 84-1, § 1.24. With the injunction in place, however, TRPA would not have been able effectively to amend the Plan to include such a screening system, and thus end its "temporary taking," at least with respect to some plaintiffs. Especially given the uphill battle that the plaintiffs face in proving a facial takings claims, *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 736 n. 10, 117 S.Ct. 1659, 137 L.Ed.2d 980 (1997), the plaintiffs have not shown that the 1984 Plan was actually the cause of the damages they may have suffered from April 26, 1984, to July 1, 1987.

Once the 1984 Plan was adopted, 81-5 and 83-21 were superseded and could cause no damages to plaintiffs. The fact the 1984 Plan may have incorporated some of the prohibitions of 81-5 and 83-21 makes no difference. The 1984 Plan was adopted as an independent, free-standing ordinance, replacing the prior ordinances and resolutions in their entirety.

The real cause of plaintiffs' harm after the T.R.O. was entered was the effect of the T.R.O. and the Preliminary Injunction, not the 1984 Plan. The 1984 Plan was for all practical purposes suspended by the T.R.O. and the Preliminary Injunction. The escape mechanisms of the 1984 Plan were nullified. No one could file an application, have an application processed, or receive a permit, notwithstanding whatever land classification was involved. Class 1, 2, 3, and SEZ classifications became irrelevant to whether a person could obtain a permit for the use of her land. The reason a permit could not be obtained was the T.R.O. and the Preliminary Injunction, not the 1984 Plan.

The 1984 Plan had no further consequences to anyone after the T.R.O. and the Preliminary Injunction were issued; these orders blocked issuance of permits for whatever reason, unless exempted specifically by them. The T.R.O. and Preliminary Injunction did not allow the 1984 Plan to go into effect, and after they were entered, the 1984 Plan could no longer inflict harm on plaintiffs because it was not the reason plaintiffs were unable to use their lands. The reason there could be no development of plaintiffs' lands was the T.R.O. and the Preliminary Injunction.

At trial, the parties focused primarily on the "foreseeability" question – that is, whether TRPA foresaw or should have foreseen that the injunction would issue. It does seem possible that TRPA may have foreseen that it would be sued. However, it does not necessarily follow that it was foreseeable that the injunction would be granted. Contrary to the plaintiffs' assertions, TRPA was reasonable and acted in good faith in attempting to comply with the Compact. There is no evidence whatsoever to support the plaintiffs' theory that TRPA secretly wanted an injunction against all construction in the Basin, and deliberately passed a deficient regional plan in order to provoke a lawsuit and, subsequently, an injunction. In addition, TRPA had been advised by its attorneys that it had legislative discretion, which would be given great deference by the courts. TRPA would therefore not necessarily have had any reason to believe that it would lose and be enjoined. TRPA clearly fought the injunction vigorously.

For the foregoing reasons, therefore, we find that none of the plaintiffs are entitled to compensation from

the defendants for the period between April 26, 1984, and July 1, 1987. For future reference, we note here that this holding really only affects the California plaintiffs – the Nevada plaintiffs' claims as to this period were dismissed long ago. *TSPC I*, 911 F.2d at 1339. We recognize that *TSPC II* did not follow the holding in *TSPC I*, since there was no majority opinion in *TSPC I* as to why the dismissal of those particular claims was being upheld – Judge Reinhardt (writing for the court in a "per curiam" opinion) felt that the 1984 Plan claims were unripe, while Judge Fletcher felt that they should be dismissed because of the causation issue. Judge Kozinski, meanwhile, dissented on this point. Nonetheless, the dismissal of these claims is the law of the case. We recognized this in our 1992 order, *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 808 F.Supp. 1474, 1477-78 (D.Nev.1992), and nothing has changed since then.

II. AFFIRMATIVE DEFENSES

As mentioned above, the defendants also claim that, notwithstanding the fact that some of TRPA's actions may have resulted in the complete denial of all economically viable use of the plaintiffs' property, those actions nonetheless should not be considered takings. First, the defendants argue that, since Ordinance 81-5 and Resolution 83-21 were always intended merely as temporary measures, not permanent solutions, they are not takings. Second, the defendants argue that the harm they were trying to prevent – that is, the eutrophication of Lake Tahoe – constitutes a "nuisance" under preexisting California and Nevada law, and thus falls within the "nuisance exception" discussed in *Lucas*. The plaintiffs, naturally, take

issue with the idea that either of these arguments should be sufficient to relieve the defendants from liability, given a finding that TRPA's actions deprived the plaintiffs of all economically viable use of their property. Both of these "affirmative defenses" will be discussed in turn below.

A. Temporary Planning Moratoria

The defendants argue that both Ordinance 81-5 and 83-21 were "reasonable temporary planning moratoria," and thus not takings. The plaintiffs, understandably, point to *First English*, for the proposition that compensation is required even for "temporary" takings. Read with *Lucas*, they say, *First English* actually mandates that all temporary moratoria on development be regarded as takings.

Unfortunately – and somewhat surprisingly – the answer is not clear. The only thing that is clear is that this is an open question. As a recent Eleventh Circuit case makes clear, "whether a temporary moratorium on development necessarily effects a temporary taking" is a "significant constitutional question of first impression." *Corn v. City of Lauderdale Lakes*, 95 F.3d 1066, 1073 (11th Cir.1996), *cert. denied*, ___ U.S. ___, 118 S.Ct. 441, 139 L.Ed.2d 378 (1997). The defendants have made an excellent case for the existence of this type of exception to the rule of *First English*.

Prior to *First English*, it was fairly clear that temporary, interim planning moratoria were not considered takings. Zoning boards, cities, counties, and other agencies used them all the time to "maintain the status quo pending study and governmental decision making." *Williams*

v. City of Central, 907 P.2d 701, 706 (Colo.Ct.App.1995). This makes sense, given that it is hard to enact a comprehensive zoning or land use plan overnight. People acting in anticipation of such a plan's imminent passage may cause the very harm the plan is meant to prevent.

However, it is unclear whether such moratoria remain legitimate planning tools after *First English*. *First English* held that states must compensate property owners for the period an unconstitutional ordinance is in effect, even if the ordinance is later invalidated or repealed. The ordinance at issue in *First English* was a complete moratorium on construction in a flood plain, enacted immediately after a flood had destroyed the existing buildings and improvements. The Court held, essentially, that once the government has "taken" property by a moratorium on construction, the fact that the moratorium later turns out to be only temporary does not relieve the government from its obligation to pay for the duration of the taking. *First English*, 482 U.S. at 322, 107 S.Ct. 2378.

Nonetheless, several courts since *First English* have held that interim planning moratoria do not always constitute takings. *Santa Fe Village Venture v. City of Albuquerque*, 914 F.Supp. 478, 483 (D.N.M.1995); *Williams*, 907 P.2d at 704; *Woodbury Place Partners v. City of Woodbury*, 492 N.W.2d 258, 262 (Minn.Ct.App.1992) *cert. denied*, 508 U.S. 960, 113 S.Ct. 2929, 124 L.Ed.2d 679 (1993); *First English Evangelical Lutheran Church v. County of Los Angeles*, 210 Cal.App.3d 1353, 258 Cal.Rptr. 893, 906 (1989) ("First English II") (decision of the California Court of Appeal on remand from the Supreme Court), reh'g denied and opinion modified (June 23, 1989), review denied (Aug. 25,

1989), *cert. denied*, 493 U.S. 1056, 110 S.Ct. 866, 107 L.Ed.2d 950 (1990); *Zilber v. Town of Moraga*, 692 F.Supp. 1195, 1206-07 (N.D.Cal.1988). This is not as surprising as it may sound at first blush. *First English* itself said that "[w]e limit our holding to the facts presented, and of course do not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us." *First English*, 482 U.S. at 321, 107 S.Ct. 2378. Further, there are significant differences between the moratorium at issue in *First English* and interim planning moratoria.

The primary difference between a temporary planning moratorium and the "temporary taking" of *First English* is essentially, as one court has described it, the difference between a "prospectively temporary" moratorium and a "retrospectively temporary" moratorium. *Woodbury Place Partners*, 492 N.W.2d at 262; *see also Williams*, 907 P.2d at 705; Frank Michelman, *Takings, 1987*, 88 Colum. L.Rev. 1600, 1621 (1988). In *First English*, the moratorium at issue was enacted with no termination date. In other words, it was not obviously intended to be temporary. According to its terms, it did not contain a date for its own expiration. Thus it would last until it was invalidated by a court, or repealed or amended. It only turned out to be temporary in retrospect, when it was amended to provide for the possibility of a variance or permit of some kind. An interim planning moratorium, on the other hand, is enacted with a deadline, usually for a short period of time. Thus, in a manner of speaking, the culpability of the government is less. Enacting an unconstitutional ordinance with no plans to end it is different

than simply putting a hold on development for a few months while trying to formulate a plan under which development will be possible.

Also, the ordinance at issue in *First English* was assumed by the Court to have "denied appellant all use of its property for a considerable period of years." *First English*, 482 U.S. at 322, 107 S.Ct. 2378. Most "interim" moratoria do not last for a "considerable period of years." If they do, they may well become unreasonable and become a taking at some point.

In short, *First English* holds that, once there has been a taking, compensation is required. Obviously, however, if there is no taking to begin with, then no compensation will be required. Thus some courts have held that interim planning moratoria, when reasonable in scope and duration, do not effect takings at all, temporary or otherwise. *See First English II*, 258 Cal.Rptr. at 906. The plaintiffs argue that, while this may have been a legitimate interpretation of the Supreme Court's decision in *First English* initially, it is no longer a permissible reading after *Lucas*. Since *Lucas* held that it does not really matter what the government's interest is when property has been deprived of all economically viable use, it should not matter how reasonable the delay is when all economically viable use is taken away for a short time. Some courts, however, have not found this argument persuasive. The response to this argument appears to be that, when a regulation is designed to be temporary, it will not, in fact, actually deprive property of *all* economically viable uses. When everyone expects the restrictions on use to end soon, there will likely still be a competitive market for the land. If the restrictions are permanent, on the other hand,

and no one expects them to end soon, the existence of a competitive market for the land is much less likely.

Thus at least two courts have held that temporary, interim planning moratoria should not be analyzed under the "categorical" takings rule of *Lucas*, but rather under the *Penn Central*, ad hoc, factual inquiry appropriate to *non*-categorical takings. *Williams*, 907 P.2d at 706-07; *Woodbury Place*, 492 N.W.2d at 263; *see also Santa Fe Village Venture*, 914 F.Supp. at 483 ("The moratorium in this case, however, did not amount to a compensable taking of the value of the property as a whole. The challenged moratorium was limited in duration (two and one-half years), designed to preserve the status quo, and enabled Congress to take legislative action concerning a potential National Monument. Thus, the scope and time of the moratorium were limited, not substantively unreasonable, and may be upheld as a matter of law given the record.").

Whether the Supreme Court would actually uphold this view is uncertain – but it is certainly possible, since *First English* and *Lucas* can be read to allow for such a result. However, we feel that, should the issue be presented to the Supreme Court, it would reach the opposite conclusion. The language in *First English* which seems to exempt "normal delays" in the permitting process clearly does not include interim moratoria. The examples given (building permits, changes in zoning ordinances, variances) all appear to involve delays that might occur once the process of applying for a permit has actually begun – not something that prevents the permit process from beginning at all. Further, the Court's reasoning in *First*

English would not seem to exempt "prospectively" temporary takings. The Court relied heavily on cases involving temporary appropriations of property by the United States during World War II, where compensation was clearly required. *First English*, 482 U.S. at 318, 107 S.Ct. 2378. Two of those cases, at least, involved appropriations of property that *were* prospectively temporary – the government had appropriated leasehold interests with fixed termination dates. *United States v. Petty Motor Co.*, 327 U.S. 372, 66 S.Ct. 596, 90 L.Ed. 729 (1946); *United States v. General Motors Corp.*, 323 U.S. 373, 65 S.Ct. 357, 89 L.Ed. 311 (1945). Since the Court relied on these cases in finding that "retrospectively" temporary regulatory takings should be compensated, it is hard to see that it would reach a different conclusion when faced with a "prospectively" temporary regulatory taking.

Finally, although we acknowledge the possibility that temporary moratoria on development may not automatically effect takings – and even the wisdom of recognizing that possibility – it does not appear that either Ordinance 81-5 or Resolution 83-21 truly fall into that category. Although 81-5 was clearly intended to be temporary, since it was adopted pending the enactment of a new regional plan, there was no fixed date for when it would terminate. One could argue that the 1980 Compact fixed the date of termination, since TRPA only had thirty months total in which to enact a regional plan – but that deadline was clearly exceeded by TRPA. With respect to Resolution 83-21, there was, of course, a built-in time limit of ninety days. But the deadline had no effect – the moratorium was continued at the end of ninety days, again until the passage of the over-due regional plan. We

do not mean to imply that TRPA was unreasonable in enacting temporary moratoria on building in high hazard lands, or that TRPA wasted time in the planning process and should have reached agreement on a regional plan sooner than it did In fact, we do not see how TRPA could have reached agreement on a regional plan any sooner. But the indefiniteness of the ordinances at issue does suggest that this is not the right case in which to hold that temporary planning moratoria do not always effect takings. Therefore, we hold that the fact that Ordinance 81-5 and Resolution 83-21 may have been intended to be temporary from the beginning does not exempt TRPA from the requirement of paying just compensation for the denial of the use of their land that the plaintiffs experienced during the time the two measures were in effect.

B. Nuisance

Finally, the defendants also argue that, notwithstanding the fact that Ordinance 81-5 and Resolution 83-21 may have denied the plaintiffs all economically viable use of their property, TRPA's actions did not effect takings. According to the defendants, the uses prohibited by the ordinances constitute "nuisances" that can be restricted without a need for just compensation.

The basis for this so-called "nuisance exception" goes back over a century, and was first articulated by the Supreme Court in the case of *Mugler v. Kansas*, 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205 (1887), in which the Court upheld a prohibition against the use of a building as a brewery (due to a general prohibition against the manufacture or sale of alcoholic beverages within the state of

Kansas), even though the prohibition drastically reduced the value of the property. The most modern formulation of the exception, however, is in *Lucas*.[4]

Lucas held that, "[w]here the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Lucas*, 505 U.S. at 1027, 112 S.Ct. 2886. In other words, all land is subject to some restrictions on use. If, at the time land is purchased, certain uses are restricted or prohibited, then the purchaser of that property does not acquire the right to put the land to one of those forbidden uses. Those uses are not part of the "bundle of rights" which the purchaser receives with the land. Thus, if the purchaser does put his property to such a use, the government can come in and put a stop to it without effecting a taking – even if the forbidden use was the only economically viable use of the property. *Id.* at 1029-30, 112 S.Ct. 2886.

---

[4] We recognize that since *Lucas*, debate has raged over whether the "exception" discussed therein should still be referred to as the "nuisance" exception, or as something else. The plaintiffs in this case, for instance, refuse to acknowledge the continued existence of a "nuisance" exception, repeatedly referring to the exception as either the "*Lucas*" exception, or the "so-called nuisance" exception. We find this dispute to be of no moment to the questions we must resolve here, however. For the sake of convenience, we refer to the exception as the "nuisance exception," fully aware that the exception, whatever it is called, is not the same post-*Lucas* as it was prior thereto.

The question, then, is whether a given use was part of the bundle of rights which a property owner acquired with her property. To resolve this question, the *Lucas* Court held that the relevant inquiry was whether the restrictions on use "inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Id.* at 1029, 112 S.Ct. 2886.

Clearly, if a use would always have been considered a common law nuisance under state property law, then it can be prohibited without the prohibition's constituting a taking. What the *Lucas* opinion does not make completely clear, but which most courts since appear to have accepted, is that "newly legislated or decreed" restrictions on land use can also constitute "background principles" of state law for this purpose – so long as those restrictions became law *before* the property owner actually purchased the property subject to the restrictions. *City of Virginia Beach v. Bell*, 255 Va. 395, 498 S.E.2d 414, 417 (1998), *cert. denied*, ___ U.S. ___, 119 S.Ct. 73, 142 L.Ed.2d 57 (1998); *Anello v. Zoning Bd. of Appeals of the Village of Dobbs Ferry*, 89 N.Y.2d 535, 656 N.Y.S.2d 184, 678 N.E.2d 870, 871 (1997), *cert. dismissed*, ___ U.S. ___, 118 S.Ct. 2, 138 L.Ed.2d 1036 (1997); *Gazza v. New York State Dept. of Envi. Conservation*, 89 N.Y.2d 603, 657 N.Y.S.2d 555, 679 N.E.2d 1035, 1039 (1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 58, 139 L.Ed.2d 22 (1997); *Grant v. South Carolina Coastal Council*, 319 S.C. 348, 461 S.E.2d 388, 391 (1995); *Hunziker v. State*, 519 N.W.2d 367, 371 (Iowa 1994), *cert. denied*, 514 U.S. 1003, 115 S.Ct. 1313, 131 L.Ed.2d 195 (1995); *Scott v. City of Del Mar*, 58 Cal.App.4th 1296, 68 Cal.Rptr.2d 317, 322-23 (1997); *Aztec Minerals Corp. v.*

Romer, 940 P.2d 1025, 1032 (Colo.Ct.App.1996). In such a case, the prior owner of the property may have had a valid takings claim, but subsequent purchasers probably will not.

Thus in order to show that TRPA's actions did not effect a taking under the nuisance exception, the defendants must demonstrate that the uses prohibited by those ordinances could have been prohibited by either:

> 1) the common law of nuisance of either California or Nevada,[5] or
>
> 2) some affirmative state or local ordinance prohibiting such uses, which was enacted prior to the plaintiffs' acquisition of their property.

In this connection, it is important to note that this is an affirmative defense, and as such the burden is on the defendants to prove that such uses would have been enjoinable under background principles of state law. *Lucas*, 505 U.S. at 1031, 112 S.Ct. 2886 (stating that "to win its case South Carolina must do more than proffer the legislature's declaration that the uses *Lucas* desires are inconsistent with the public interest, or the conclusory assertion that they violate a common-law maxim such as *sic utere tuo ut alienum non laedas*. . . . Instead, as it would be required to do if it sought to restrain *Lucas* in a

---

[5] Obviously, those plaintiffs owning land in California would be governed by California nuisance law, and those plaintiffs owning land in Nevada would be governed by Nevada nuisance law. In theory, this could result in a situation in which something might be a "nuisance" on one side of the lake but not on the other. However, we have not found this to be the case.

common-law action for public nuisance, South Carolina must identify background principles of nuisance and property law that prohibit the uses [*Lucas*] now intends in the circumstances in which the property is presently found").

Before delving into the common law of either Nevada or California, it is also worth noting that *Lucas* itself casts doubt on the idea that "common-law principles would have prevented the erection of any habitable or productive improvements on petitioner's land; they rarely support prohibition of the 'essential use' of land." *Id.* at 1031, 112 S.Ct. 2886. Further,

> "[t]he fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition (though changed circumstances or new knowledge may make what was previously permissible no longer so[)]. . . . So also does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant."

Id. Thus it appears that the defendants face a rather difficult battle in attempting to show that the building of single-family homes at Lake Tahoe would have constituted a nuisance in either California or Nevada. Property owners who had constructed homes on high hazard lands prior to the time period at issue here have most definitely not been required to tear down their homes and recreate a natural environment.

In California, nuisance is defined by statute as:

> Anything which is injurious to health, . . . or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.

Cal. Civ.Code § 3479. There is an extensive body of case law in California on what constitutes a nuisance, and it does appear that pollution of water is generally treated as one, and has been treated as such for a long time. "The law is well settled that any use of a stream which materially fouls and adulterates the water, or the deposit or discharge therein of any filthy or noxious substances that so far affect the water as to impair its value for the ordinary purposes of life, or anything that renders the water less wholesome than when in its ordinary state, will constitute a nuisance, which courts of equity will enjoin, and for which a lower riparian owner, injured thereby, is entitled to redress." *Joerger v. Pacific Gas & Elec. Co.*, 207 Cal. 8, 276 P. 1017, 1025 (1929).

However, the current situation is not clearly analogous to either the code definition or the case law. All of the cases cited by the defendants require a much more significant contribution to the problem on the part of those enjoined, as well as a much more significant problem to begin with. *See, e.g., People v. Gold Run Ditch & Mining Co.*, 66 Cal. 138, 4 P. 1152, 1153-54 (1884) (upholding injunction against hydraulic mining company that had been "daily discharging into the [American] river between four and five thousand cubic yards of solid material from its said mine, to-wit, of bowlders [sic],

cobbles, gravel, and sand," which, together with similar discharges of other companies, had caused the American and Sacramento Rivers to become 6 to 12 feet shallower, making navigation much more difficult, and in some places impossible, and the likelihood of flooding much greater); *People ex rel. Ricks Water Co. v. Elk River Mill & Lumber Co.*, 107 Cal. 214, 40 P. 486, 487 (1895) (upholding injunction against maintaining cattle and hogs on banks of river, where this had resulted in, among other problems, "a pile of manure about seventy feet in length, eight feet deep, and sixteen to eighteen feet in width," and which the defendant had allowed "to lie there and rot on the bank of said stream, and the drainage therefrom flow directly into the waters of said stream, and pollutes the same, and renders the waters thereof offensive to the senses and unwholesome and unfit for domestic uses"); *People v. Truckee Lumber Co.*, 116 Cal. 397, 48 P. 374, 374 (1897) (upholding an injunction against polluting the Truckee River with "large quantities of refuse matter, consisting of sawdust, shavings, slabs, edgings, waste, and other deleterious substances, the effect of which has been and is to pollute said stream and the waters thereof, and render the same unfit for use, and which substances are poisonous and deleterious to the fish in said stream, and are killing, destroying, and exterminating them"); *Thompson v. Kraft Cheese Co. of Cal.*, 210 Cal. 171, 291 P. 204, 205-06 (1930) (upholding injunction against "emptying, throwing, discharging or permitting to escape, any dirty water, sour milk, slops, refuse, offal, or other liquid or semi-liquid matter, either directly or indirectly, by means of cesspools or otherwise, into said branch of Nicasio creek or directly upon lands of plaintiffs" such as

had caused the plaintiffs' hogs to become "sickly" with a roundworm infestation); *City of Turlock v. Bristow*, 103 Cal.App. 750, 284 P. 962, 964 (1930) (upholding injunction against maintaining open irrigation ditches in city limits "in such a manner as to permit the accumulation of foul and stagnant water, refuse matter, filth, and garbage which became a breeding place for typhoid and other disease germs and permeated the air with noxious, unwholesome, and offensive vapors and odors, rendering the ditch unsanitary, causing the neighborhood to become unhealthful, and destroying the comfort and enjoyment of the homes and property of the citizens of that vicinity"); *Freitas v. City of Atwater*, 196 Cal.App.2d 289, 16 Cal.Rptr. 397, 399 (1961) (upholding injunction against polluting the water of the Atwater Main, when said pollution had resulted in "obnoxious odors" and gases that "burned the eyes" emanating from the water, as well as dead fish). It is certainly true that Lake Tahoe is faced with serious harm, which ought to be prevented if at all possible, but it is not the type of harm contemplated by California nuisance law. No testimony supported the idea that the lake will become a health hazard, or otherwise "indecent" or "offensive." The fact that the lake may turn green and opaque, and be reduced to a pale copy of its current self, is abhorrent to think on – yet not, unfortunately, a "nuisance" as defined by the pre-existing law of California.

Finally, apart from the nuisance issue, there is the possibility that some other "background principle" of California law may prohibit the use to which the plaintiffs wish to put their land. The only law we have found that might provide any basis for a finding that a pre-

existing regulation prohibited certain uses of property is the Porter-Cologne Water Quality Control Act, enacted in 1969, which amended the existing Water Code provisions. As amended, the statute defines "waste" as including "sewage and any and all other waste substances, liquid, solid, gaseous, or radioactive, associated with human habitation, or of human or animal origin, or from any producing, manufacturing, or processing operation . . . of whatever nature." Cal. Water Code § 13050(d). The code also defines nuisance as anything that "(1) [i]s injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property. . . . [and] (3)[o]ccurs during, or as a result of, the treatment or disposal of wastes." Cal. Water Code § 13050(m). This has been interpreted to mean that "water pollution occurring as a result of treatment or discharge of wastes in violation of Water Code section 13000 et seq. is a public nuisance per se." *Jordan v. City of Santa Barbara*, 46 Cal.App.4th 1245, 54 Cal.Rptr.2d 340, 346 (1996); *Newhall Land & Farming Co. v. Superior Court*, 19 Cal.App.4th 334, 23 Cal.Rptr.2d 377, 381 (1993). The definition of "waste" has been interpreted as including "concentrated silt or sediment associated with human habitation and harmful to the aquatic environment." *Lake Madrone Water Dist. v. State Water Res. Control Bd.*, 209 Cal.App.3d 163, 256 Cal.Rptr. 894, 897 (1989).

However, the facts of our case are nonetheless distinguishable. *Lake Madrone*, which interpreted the Water Code to include "concentrated silt or sediment" as "waste," involved sediment which was concentrated by a dam to the point where, when released, silt up to 18

inches deep was deposited in Berry Creek, "choking its pools and shoreline and clogging its spawning areas so heavily as to destroy fish and aquatic life." *Lake Madrone*, 256 Cal.Rptr. at 895. The one act that was enjoined was the releasing of water from the bottom of the dam, where all the sediment was collected. Thus the relationship between the enjoined act and the damage was much more direct, and the damage much more immediate. Although the runoff at Lake Tahoe may be "associated with human habitation," the statutorily defined nuisance only applies when such "waste" is discharged "during, or as a result of, the *disposal or treatment* of wastes." Simply building a house does not seem to fall within this definition. In *Lake Madrone*, the defendant did commit an act that could be construed as "disposing" of wastes – i.e., opening the gates in the dam and releasing the sediment-choked water into the stream. Thus we hold that the Porter-Cologne Act, although it may have modified California's common law of nuisance, did not so modify it that the activities at issue here could be considered nuisances under that law. (For future reference, though, we note here that even if the Porter-Cologne act were held to constitute a sufficient "background principle" of state law, it might not apply to all of the plaintiffs in this case anyway. Some plaintiffs may well have purchased their land prior to 1969. Those facts are not in the record developed so far.)

Finally, it should be noted that the fact that fish might in the future be threatened in Lake Tahoe as a result of the increased sediment runoff, which was suggested by some of the evidence at trial, does not appear to be enough to prove an existing nuisance. It appears

that actual damages may be necessary before a nuisance can be enjoined. "In California, an action for private nuisance cannot be maintained for an interference in the use and enjoyment of land caused solely by the fear of future injury. . . . Damage or injury has long been considered an essential element of a cause of action for nuisance." *Jordan*, 54 Cal.Rptr.2d at 346. Thus we cannot hold that anything "inhere[d] in the title" of the plaintiffs' properties that would prevent the construction of single-family homes thereon. *Lucas*, 505 U.S. at 1029, 112 S.Ct. 2886.

In Nevada, there is no case law on pollution of water as a nuisance. As in California, nuisance is defined by statute as:

> Except as otherwise provided in this section, anything which is injurious to health, or indecent and offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property. . . .

N.R.S. 40.140(1). The California statute was first adopted in 1872; the Nevada statute in 1911. Given the Nevada Supreme Court's preference for interpreting statutes adopted nearly verbatim from other states in light of the other state's case law existing at the time of adoption, *Peke Resources, Inc. v. Fifth Judicial Dist. Court In and For the County of Esmeralda*, 113 Nev. 1062, 944 P.2d 843, 847 (1997), the Nevada statute would probably be interpreted much along the lines of the early California cases, under which, as we have seen, this case would clearly not constitute a nuisance.

As in California, there is one law in Nevada that could conceivably provide a basis for a finding that some other "background principle" of Nevada law prohibited construction on the plaintiffs' land – that is, the "Nevada Water Pollution Control Law," originally passed in 1973, and currently codified at N.R.S. 445A.300-445A.730. Section 445A.325 defines "contaminant" as "any physical, chemical, biological or radiological substance or matter which is added to water." Section 445A.400 defines "pollutant" as "dredged soil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal and agricultural waste discharged into water." This definition seems even less likely to encompass the erosion runoff at issue here than California's definition. Thus we do not interpret this statute to prohibit the construction of single-family homes on the plaintiffs' property.

Finally, with respect to both Nevada and California, we note that we have assumed thus far that all current plaintiffs purchased their land prior to the enactment of 81-5. Should this not be the case for any individual plaintiff, we think that such a plaintiff would be barred from receiving damages. Ordinance 81-5 and the following actions would appear to constitute a "background principle of state law" applicable to all subsequent purchasers, who are presumed to have knowledge of all such restrictions. Therefore, we hold that the defendants have not proven that the "nuisance exception" to the categorical takings rule of *Lucas* should apply here.

IT IS THEREFORE HEREBY ORDERED that TRPA shall pay damages to the plaintiffs for the period from August 24, 1981, to April 25, 1984, except as to the Nevada-side Class 1-3 plaintiffs, as to whom TRPA shall pay damages only for the period from August 27, 1983, to April 25, 1984.

TAHOE-SIERRA PRESERVATION COUNCIL, INC., et al., Plaintiffs,

v.

TAHOE REGIONAL PLANNING AGENCY, et al., Defendants.

No. CV-N-84-257-ECR.

United States District Court,
D. Nevada.
Jan. 28, 1998.

Lawrence L. Hoffman, Law Offices of Lawrence L. Hoffman, Tahoe City, CA, for Plaintiffs.

Rachelle J. Nicolle, Susan E. Scholley, Tahoe Regional Planning Agency, Zephyr Cove, NV, J. Thomas Susich, Vicki E. Hartigan, Crowell, Susich, Owen & Tackes, Ltd., Carson City, NV, for Tahoe Regional Planning Agncy.

William Frey, Deputy Attorney General, Carson City, NV, for State of Nevada.

Mary J. Schoonover, Richard M. Frank, California Department of Justice, Sacramento, CA, for State of California.

ORDER

EDWARD C. REED, JR., District Judge.

Currently before the Court are five motions filed by the defendants under cover of one document (# 250), filed on August 15, 1997. Plaintiffs filed a response to these motions (# 251) on October 6, 1997, to which defendants filed a reply (# 252) on October 30, 1997. Each of

these five motions will be dealt with in separate orders. The subject of the instant order is Motion No. 3, which for the reasons set forth below is hereby GRANTED.

MOTION NO. 3

Motion No. 3[1] is for an order dismissing "all plaintiffs' claims which challenge the 1987 Regional Plan."

---

[1] This case has been pending for almost fourteen years, and has generated at least seven *published* opinions so far. Since the procedural history and the facts of this case have been set forth in more than one of these previous opinions, we feel it is unnecessary to recite them again here. *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 611 F.Supp. 110 (D.Nev.1985), *aff'd in part, vacated in part, and rev'd in part by Tahoe Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 911 F.2d 1331 (9th Cir.1990); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 638 F.Supp. 126 (D.Nev.1986), *vacated, Tahoe Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 911 F.2d 1331 (9th Cir.1990); *Tahoe Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 911 F.2d 1331 (9th Cir.1990) (*"TSPC I"*), *cert denied, Tahoe Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 499 U.S. 943, 111 S.Ct. 1404, 113 L.Ed.2d 459 (1991); *Tahoe Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 938 F.2d 153 (9th Cir.1991) (*"TSPC II"*) (reviewing unpublished decisions of the District Court for the Eastern District of California); *Tahoe Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 808 F.Supp. 1474 (D.Nev.1992) (Nevada-side case) *aff'd in part and rev'd in part by Tahoe Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 34 F.3d 753 (9th Cir.1994); *Tahoe Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 808 F.Supp. 1484 (D.Nev.1992) (California-side case) *aff'd in part and rev'd in part by Tahoe Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning*

Defs.' Mem. of P. & A. in Supp. of Mot. Dismissing All Claims as to 1987 Reg'l Plan (Mot.# 3) at 1. The basis for this motion is that these claims are all barred by the statute of limitations. Given the Ninth Circuit's statement, in its most recent decision in this case, that "[n]o part of TSPC's § 1983 claim is time-barred," *Tahoe Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 34 F.3d 753, 756, amended by 42 F.3d 1306 (9th Cir.1994) (*"TSPC III"*), the defendants' motion would appear to be doomed.

However, the defendants argue that this part of the Ninth Circuit's holding in *TSPC III* is "clearly erroneous and would work a manifest injustice," and is thus not binding under the law of the case doctrine. Defs.' Mem. of P. & A. in Supp. of Mot. Dismissing All Claims as to 1987 Reg'l Plan (Mot.# 3) at 5. Given the long and complicated history of this case, it would not be at all surprising if a mistake – even a "clearly erroneous" one – had been

---

Agency, 34 F.3d 753 (9th Cir.1994); *Tahoe Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 34 F.3d 753 (9th Cir.) (*"TSPC III"*), *amended by Tahoe Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 42 F.3d 1306 (9th Cir.1994), *cert denied, California v. Tahoe Sierra Preservation Council*, 514 U.S. 1036, 115 S.Ct. 1401, 131 L.Ed.2d 288 (1995).

After *TSPC III* was decided and the case remanded to us for the second time, the defendants filed answers, and the parties slowly began to prepare for an actual trial. Pursuant to an order of this Court dated February 13, 1997, (# 225) the defendants filed five pretrial motions, including the one under discussion here. Although this motion is not characterized as such by the defendants, it would appear to be, in essence, a motion for partial judgment on the pleadings, as provided for by Fed.R.Civ.P. 12(c).

made somewhere along the way. Since justice demands that, to the extent possible, we correct such mistakes, we are required to examine the defendants' claim to determine if a "clearly erroneous" mistake has in fact been made.

The plaintiffs, naturally, emphasize heavily in their response to this motion the Ninth Circuit's holding that "[n]o part of TSPC's § 1983 claims is time-barred." Pls.' Resp. to Mot. No. 3 at 22, citing *TSPC III* at 756. They characterize the dispute over which statute of limitations applied to their § 1983 challenges as a "hotly-debated issue" until it was resolved by the Ninth Circuit in *TSPC III*. *See* Pls.' Resp. to Mot. No. 3 at 23. No doubt this is true, although it should be noted that the issue was never debated at all (hotly or otherwise) before this Court – it was apparently raised for the first time in the opening brief that the plaintiffs filed with the Ninth Circuit in 1993, in appealing our 1992 decision to dismiss the First Amended Complaints. *See* Opening Br. of Appellants, No. 93-15113 & No. 93-15114, at 28-33 (dated Apr. 26, 1993), *attached as* Ex. D to Defs.' Reply Mem. in Supp. of Five Pretrial Mots. (doc. # 252) [hereinafter Pls.' 1993 Opening Br.]. However, it is certainly true that the issue's import extends beyond this case – the Tahoe Regional Planning Agency ("TRPA") has faced, and no doubt will continue to face, numerous other challenges to its regulations and ordinances.

The plaintiffs state that the Ninth Circuit's resolution of the issue "is, of course, controlling law in this case, and it is simply not susceptible to being set aside by this Court, even if it should not agree with that holding." Pls.' Resp. to Mot. No. 3 at 23. However, it is *not* the Ninth

Circuit's ruling on the issue of which statute of limitations should be applied to TSPC's § 1983 challenges[2] that

---

[2] While it is unnecessary to examine the issue in much depth here, in brief the question was whether TSPC's § 1983 takings challenges were subject to the same statute of limitations as other § 1983 claims, or rather the statute of limitations set forth in the Tahoe Regional Planning Compact (the "Compact") which had created TRPA, and which provided that all challenges to plans, regulations, or ordinances adopted by TRPA should be brought within sixty days. Cal. Gov't Code § 66801, Art. VI(j)(4) (West 1997); Nev.Rev.Stat. § 277.200, Art. VI(j)(4) (1997). While the opinion in *TSPC III* makes the outcome seem forgone, that was not entirely the case. As an "Agreement of Compact" between the states of Nevada and California, the Compact had to be approved by the Congress of the United States. U.S. Const. art I, § 10, cl. 3. Congress granted its initial approval to the Compact on December 18, 1969. Pub.L. 91-148, 83 Stat. 360. Hence, the Compact is *federal* law. *See League to Save Lake Tahoe v. Tahoe Reg'l Planning Agency*, 507 F.2d 517 (9th Cir.1974). As the Supreme Court pointed out in *Wilson v. Garcia*, the case which first made clear that § 1983 claims are best characterized as analogous to personal injury claims and should thus be subject to the state statute of limitations for personal injury claims, the resort to state law was only the second step that Congress had mandated in interpreting the Reconstruction Civil Rights Acts, of which § 1983 is a part. The first step was to "look to the laws of the United States." *Wilson v. Garcia*, 471 U.S. 261, 267, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985). "[R]esort to state law – the second step in the process – should not be undertaken before principles of federal law are exhausted." *Id.* at 268. And "state law shall only apply 'so far as the same is not inconsistent with' federal law." *Id.* at 269. Since applying state law personal injury statutes of limitations to TRPA's actions is inconsistent with federal law – i.e., the Compact – it does not seem unreasonable to think that Congress, in approving the Compact, might have intended the sixty-day limitations period to apply in this type of situation. Nonetheless, we do not mean to suggest (anymore than do the defendants, as we understand their

the defendants claim is wrong. Rather, it is the Ninth Circuit's holding that the defendants *waived their ability to raise* the correct statute of limitations.

If the defendants are correct, and they have not waived this defense, then the plaintiffs' attempt to state a cause of action against the 1987 Regional Plan in their amended complaints is as time-barred by the correct statute of limitations as we previously held it to be by the sixty-day statute of limitations provided in the Compact. *See Tahoe Sierra Preservation Council, Inc.*, 808 F.Supp. at 1482-83; *Tahoe Sierra Preservation Council, Inc.*, 808 F.Supp. at 1491. Over four years had passed between July 1, 1987, the effective date of the 1987 Plan, and October 28, 1991, the date on which the plaintiffs filed the earlier of their two amended complaints. Since the plaintiffs' claims are facial challenges, the effective date of the Plan is when their cause of action accrued and the statute of limitations began to run. *TSPC III*, 34 F.3d at 755; *see also Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 688 (9th Cir.1993).Thus, since the statute of limitations for § 1983 claims is one year in California, *Levald*, 998 F.2d at 688, and two years in Nevada, *Perez v. Seevers*, 869 F.2d 425, 426 (9th Cir.1989),[3] it is indisputable that the plaintiffs did

---

argument) that the Ninth Circuit decision on this issue was in any way incorrect. *Wilson v. Garcia* certainly did state that § 1983 "is fairly construed as a directive to select, in each state, the one most appropriate statute of limitations for all § 1983 claims." *Id.* at 275. We merely point out that the defendants were not just willfully ignoring the only viable statute of limitations in favor of some obviously inapplicable one.

[3] These are the statute of limitations periods for § 1983 claims accruing after the 1985 Supreme Court decision of *Wilson*

not bring their claims against the 1987 Plan within what is now clear is the appropriate statute of limitations

---

v. Garcia, 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985) (holding that the statute of limitations for § 1983 claims accruing in a state is that state's statute of limitations for personal injuries), discussed *supra* note 2. Since the instant motion involves only the plaintiffs' claims against the 1987 Plan (which, despite the plaintiffs' best efforts to argue otherwise, cannot be seen as having accrued any *earlier* than 1987), we do not need to be concerned here with what the statute of limitations is for § 1983 claims which accrued prior to *Wilson* – except to note that, at least in 1984, when the plaintiffs initially filed this action, it was probably three years in both California and Nevada. *Golden Gate Hotel Ass'n v. San Francisco*, 18 F.3d 1482, 1485 (9th Cir.1994); *Mason v. Schaub*, 564 F.2d 308, 309 (9th Cir.1977). However, as late as November 1991, the Ninth Circuit indicated that the appropriate statute of limitations for takings claims in California was either five or six years. *Azul Pacifico, Inc. v. Los Angeles*, 948 F.2d 575, 587 (9th Cir.1991) ("*Azul I*"). Either way, the plaintiffs' 1987 Plan claims would have been timely filed. While the *Azul I* decision was withdrawn and replaced on July 23, 1992, *Azul-Pacifico, Inc. v. Los Angeles*, 973 F.2d 704 (9th Cir.1992) ("*Azul II*"), it is important to note that all of the defendants' motions to dismiss the amended complaints were filed while *Azul I* was the law in this circuit. Def. Tahoe Reg'l Planning Authority's Mot. to Dismiss Pls.' First Am. Compls. for Inverse Condemnation, Denial of Const. and Civ. Rights, and Just Compensation and Damages (Fed.R.Civ.P. 12[b][6]) (filed May 27, 1992) (doc. # 140); Def. State of California's Mot. to Dismiss Pls.' First Am. Compls. for Inverse Condemnation, Denial of Const. and Civ. Rights, and Just Compensation and Damages (Fed.R.Civ.P. 12[b][6]) (filed June 12, 1992) (doc. # 145); Def. State of Nevada's Mot. to Strike (filed June 12, 1992) (doc. # 147). For an example of the impact of this confusion on other takings cases pending at the time, see *Golden Gate Hotel Ass'n v. San Francisco*, 18 F.3d 1482 (9th Cir.1994). It is also interesting to note that one reason for the *Azul I* court's decision was that, apparently, the plaintiff in that case had not

period. Unless the defendants have in fact waived their ability to raise the correct statute of limitations as a defense, therefore, all of the plaintiffs' claims against the 1987 Plan will be time-barred.[4]

---

brought its takings claims as § 1983 claims, but rather as independent claims that its constitutional rights had been violated. *Azul II* thereafter also clarified that all takings claims and other claims for constitutional violations MUST BE BROUGHT UNDER § 1983. *Azul II*, 973 F.2d at 705 ("Plaintiff has no cause of action under the United States Constitution. We have previously held that a litigant complaining of a violation of a constitutional right must utilize 42 U.S.C. § 1983."). This raises the question of just what, exactly, was dismissed in *TSPC III* when the Ninth Circuit dismissed all of the plaintiffs' "takings claims" as barred by the sixty-day Compact statute of limitations, but held that its "§ 1983 claims" were not time-barred. *TSPC III*, 34 F.3d at 755.

[4] Of course, if the plaintiffs' claims against the 1987 Plan somehow "related back" to their original complaints, as provided by Fed.R.Civ.P. 15(c), then it would not matter that the claims were not filed within the appropriate statute of limitations period. However, both this Court and the Ninth Circuit have already held that the 1987 Plan did not arise from the same conduct, transaction, or occurrence as the regulations at issue in the original complaints, and so cannot relate back to those complaints. *TSPC III*, 34 F.3d at 755 ("This court has already determined that the 1987 Plan was markedly different from its 1984 predecessor. . . . Accordingly, the 1987 Plan cannot be considered the same transaction or occurrence as the 1984 plan, within the meaning of Fed.R.Civ.P. 15(c)."); *Tahoe Sierra Preservation Council, Inc.*, 808 F.Supp. at 1482-83; *Tahoe Sierra Preservation Council, Inc.*, 808 F.Supp. at 1491. Hence, to escape the statute of limitations problem, the plaintiffs should have filed for redress of their 1987 Plan claims by July 1, 1988, in California, and July 1, 1989, in Nevada. Of course, we undoubtedly would still have held on initial review that their claims were barred by the sixty-day Compact statute of

The key issue of whether the defendants waived their ability to raise the correct statute of limitations as a defense was not raised before this Court prior to the instant motion. This was undoubtedly due to the fact that, in arguing over the defendants' motions to dismiss the First Amended Complaints, the only statute of limitations ever proposed was the sixty-day one. The arguments centered around whether any of the plaintiffs' claims were barred by that statute of limitations, not whether another statute of limitations would be more appropriate. *See, e.g.*, Defs.' Mem. of P. & A. in Supp. of Def. Tahoe Reg'l Planning Agency's Mot. to Dismiss Pls.' First Am. Compls. (filed May 27, 1992) (doc. # 141); Pls.' Mem. of P. & A. in Opp'n to All Defs.' Mots. to Dismiss and Related Mots. (filed Aug. 18, 1992) (doc. # 155).

It appears that the plaintiffs did raise the question of whether another limitations period would be more appropriate, but they did not do so until they filed their opening brief with the Ninth Circuit in their appeal of our 1992 decisions. *See* Pls.' 1993 Opening Br. at 28-33. But the *waiver* issue, at least as it is before us now, does not appear to have been raised by the parties at all, even on appeal. Of course, our record of what transpired on appeal is incomplete – we have only been provided with some of the briefs filed by the parties, and we do not have the transcript of oral arguments before the Circuit. But what we do have suggests that, while the word "waiver" does appear in the plaintiffs' briefs, they were using it in a different sense, and not at all with respect to

---

limitations, but at least now the plaintiffs' claims would clearly be timely.

the defendants' argument that the 1987 Plan claims were time-barred. *See, e.g.*, Plaintiffs' 1993 Opening Brief at 27-28.

One of the plaintiffs' arguments was that, since the defendants had failed to "cross-appeal" the time-bar issue in either of the two earlier appeals, they had somehow waived those defenses. *Id.* However, neither district court had ruled that the sixty-day Compact statute of limitations was inapplicable to § 1983 actions, so failing to "cross-appeal" that issue would not appear to constitute a waiver of any sort. In addition, the plaintiffs argued that the earlier Ninth Circuit decisions had conclusively resolved the time-bar issue in their favor, thus preventing the defendants from raising it again in *TSPC III*. *Id.* However, the idea that either *TSPC I* or *TSPC II* resolved the time-bar issue is ludicrous. Both opinions specifically state that they "express no view" on the issue. *TSPC I*, 911 F.2d at 1342 n. 11 ("We express no view on any of the possible statute of limitations issues that might be raised."); *TSPC II*, 938 F.2d at 158 ("We express no view on the time-bar issue. . . . "). Even if either of these arguments had any validity in regard to the Ordinance 81-5 or Resolution 83-21 claims, however, they have no impact on the 1987 Plan claims at issue here. No claims against the 1987 Plan were raised by the plaintiffs until they filed their First Amended Complaints, after both *TSPC I* and *TSPC II* had been decided – so nothing that had or had not been argued in those appeals would prevent the defendants from raising any defenses to the newly filed 1987 Plan claims.

However, even though the parties had not addressed the issue of whether the defendants had waived any

defenses to the 1987 Plan claims, the Ninth Circuit held that the defendants had waived their right to raise any statute of limitations but the sixty-day Compact one as a defense. The Circuit's holding on this point consists of only three sentences: "The defendants did not plead any other statute of limitations except the 60-day one. Failing to plead affirmatively any other statute of limitations, they cannot now rely on any other. No part of TSPC's § 1983 claim is time-barred." *TSPC III*, 34 F.3d at 756. It is this limited part of the Ninth Circuit's holding in *TSPC III* that the defendants claim should not be treated as law of the case.[5]

"Under the 'law of the case' doctrine, 'a court is generally precluded from reconsidering an issue that has already been decided by the same court, or a higher court in the identical case.' " *U.S. v. Alexander*, 106 F.3d 874, 876 (9th Cir.1997) (quoting *Thomas v. Bible*, 983 F.2d 152, 154 (9th Cir.1993)). "A court may have discretion to reopen a previously resolved question only where (1) the first decision was clearly erroneous; (2) an intervening change in

---

[5] Of course, the most reasonable explanation of this language may be that it is simply dicta, and as such has no preclusive force under the law of the case doctrine. *Milgard Tempering, Inc. v. Selas Corp. of America*, 902 F.2d 703, 716 (9th Cir.1990). After all, the issue of waiver was not before the court, so no holding on the question was necessary to resolve the appeal. However, the plaintiffs have argued strenuously that *TSPC III* resolved the issue conclusively, for ever and always. Thus, in order to address the plaintiffs' arguments, we have not treated this language as dicta. If it is dicta, then the following discussion of the law of the case doctrine is unnecessary – however, we note that our subsequent discussion and resolution of the waiver question itself would be necessary either way.

the law has occurred; (3) the evidence on remand is substantially different; (4) other changed circumstances exist; or (5) a manifest injustice would result." *Disimone v. Browner*, 121 F.3d 1262, 1266 (9th Cir.1997). It is the first exception that is at issue here. The defendants claim that this part of the Ninth's Circuit's decision is "clearly erroneous," and, for the following reasons, we agree.

At the time the Ninth Circuit heard the appeal in *TSPC III*, none of the defendants had ever filed an answer, or any other type of pleading. The Federal Rules of Civil Procedure define the types of papers which are considered pleadings, and a 12(b)(6) motion to dismiss is not one of them. Only the following are considered pleadings: a complaint, an answer, a reply to a counterclaim, an answer to a cross-claim, a third-party complaint, a third-party answer, and a reply to an answer or to a third-party answer. Fed.R.Civ.P. 7(a). In most cases, the first *pleading* a defendant will file is its answer, although that may not be the first *document* to be filed. Often, a defendant will file an answer only after a pre-answer motion to dismiss has been filed and denied. Since *TSPC III* was an appeal from the *grant* of a 12(b)(6) motion to dismiss, the defendants never really had the opportunity to file an answer. Thus it was clearly wrong to say that the defendants had waived their right to raise other statute of limitations defenses *by not pleading them*, since up to that point the defendants had not *pled* anything at all, and had not been required to plead anything at all.

Of course, it is understandable that the Circuit might not have realized that, *ten years* into the litigation, the defendants had never actually *answered* the complaints. But such was indeed the case. In fact, the defendants

never filed answers to the original complaints, and only filed answers to the First Amended Complaints in 1995, after the *TSPC III* decision had been issued. Instead, in response to both the original complaints and the First Amended Complaints, the defendants filed motions to dismiss. Since these motions were granted by the district courts, the defendants were not required to file answers until after the Ninth Circuit had reviewed and remanded the cases. Thus it is obvious that the first *pleadings* of any kind filed by any of the defendants were the answers filed in July 1995 – in which the defendants raised as a defense the statute of limitations. Defs.' Answer to First Am. Compl. for Inverse Condemnation, Denial of Const. & Civ. Rights, & Just Compensation & Damages (Nevada plaintiffs) (filed July 7, 1995) (doc. # 199) [hereinafter Nevada-side Answer]; Defs.' Answer to First Am. California-side Compl. for Inverse Condemnation, Denial of Const. & Civ. Rights, & Just Compensation & Damages (California plaintiffs) (filed July 7, 1995) (doc. # 198) [hereinafter California-side Answer].

Therefore, with all due respect to the Ninth Circuit, we are constrained to find that the Circuit's holding in *TSPC III* that the defendants had waived their right to raise the correct statute of limitations as an affirmative defense *because they had not pled it* is clearly erroneous, and was almost certainly premised on the mistaken – but understandable – assumption that at some point during the ten years the case had then been pending the defendants must have filed a responsive pleading of some kind.

Since the Ninth Circuit's decision that the defendants waived their right to raise the correct statute of limitations as a defense by not pleading it was clearly wrong, we must now address the question of whether the defendants may have waived their right to raise this defense in some other way. To do otherwise would be to ignore the possibility that, while the Circuit's *reasoning* was clearly erroneous, its *result* was correct. Since this question was not presented to us prior to the *TSPC III* appeal, we do not have a decision on which to fall back for guidance, and must therefore start from the beginning in examining this question.

The answer to the question of waiver would appear to lie squarely within the terms of the Federal Rules of Civil Procedure. Rule 8(c), subtitled "Affirmative Defenses," states that: "In pleading to a preceding pleading, a party shall set forth affirmatively . . . statute of limitations . . . and any other matter constituting an avoidance or affirmative defense." Fed.R.Civ.P. 8(c). This Rule has often been held to mean that, if a party files a "pleading to a preceding pleading" (usually an answer to a complaint), and does not include an affirmative defense therein, that defense will be considered waived. 5 Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1278, at 477 ("Generally, a failure to plead an affirmative defense results in the waiver of that defense and its exclusion from the case."); *see also United States Postal Serv. v. American Postal Workers Union*, 893 F.2d 1117 (9th Cir.1990) (holding that failure to plead six-month statute of limitations, or otherwise assert the defense in district court, waived the defense); *Cooperative Finance Ass'n, Inc. v. Garst*, 917 F.Supp. 1356, 1385 (N.D.Iowa 1996) ("Courts

have held that failure to plead an affirmative defense to a claim in a responsive pleading waives or forecloses assertion of that defense for the first time later in the litigation, usually finding authority for this conclusion in Fed.R.Civ.P. 8(c), which specifically requires the pleading of affirmative defenses in responsive pleadings."). Thus the Ninth Circuit would clearly have been in accordance with the Rules to hold that, by not pleading an affirmative defense, the defendants had waived it – *if* they had filed a pleading from which such a defense could have been omitted.

However, even that holding, while consistent with the rules, would have conflicted with previous Ninth Circuit cases. Many courts, including the Ninth Circuit, have liberalized the rule that omitting a defense from the answer waives it, and have allowed parties to raise various affirmative defenses (including the statute of limitations) at any time up to and including trial – so long as the other party was not prejudiced by the delay in raising the defense. *See, e.g., Magana v. Commonwealth of the Northern Mariana Islands*, 107 F.3d 1436, 1446 (9th Cir.1997) ("We have liberalized the requirement that defendants must raise affirmative defenses in their initial pleadings. However, defendants may raise an affirmative defense for the first time in a motion for summary judgment only if the delay does not prejudice the plaintiff."); *Han v. Mobil Oil Corp.*, 73 F.3d 872, 877 (9th Cir.1995) (stating that "we have ruled that an affirmative defense based on the lapse of a statutory limitation period may be raised for the first time on a motion for summary judgment when there is no prejudice to the plaintiff"); *Rivera v. Anaya*, 726 F.2d 564, 566 (9th Cir.1984) (holding that

defendant's "initial failure to raise the statute of limitations in his initial pleading does not preclude him from making a motion for summary judgment based on that defense").

The instant case, of course, is different, in that the statute of limitations defense *was* raised in the answers. Nevada-side Answer para. 43, at 13; California-side Answer para. 43, at 12. The defendants are not seeking to raise the defense for the first time after omitting it from a responsive pleading. The apparent problem here is that the defendants raised the defense in their answer *after not asserting it in a pre-answer motion to dismiss*. Of course, common sense would indicate that, if a party can be excused for omitting an affirmative defense from a document in which the Federal Rules mandate that such a defense be included, a party should also be excused for omitting an affirmative defense from a document in which such a defense is *not* mandated to appear, by the Federal Rules or any other authority. Unfortunately, as is often the case, our analysis cannot end with common sense.

To continue, the Rules themselves also seem to indicate that it would not matter if a defendant filed a pre-answer motion without including the affirmative defense of the statute of limitations – the defense would still not be waived. Rule 12(b) states that:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be

> made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. . . .

Fed.R.Civ.P. 12(b).

To begin with, it should be obvious that the defense of statute of limitations is not listed in this rule. Some courts have therefore questioned whether it is even permissible to raise such a defense in a pre-answer 12(b) motion. *See, e.g.*, 5 Wright & Miller § 1277, at 461-62 ("Numerous cases state that the affirmative defenses listed in Rule 8(c) . . . must be asserted in defendant's answer and cannot be the basis for a motion to dismiss the complaint. . . . "). However, most courts have held that the statute of limitations defense, as well as other non-enumerated defenses, may fall within the scope of 12(b)(6), and thus is appropriately raised in a 12(b)(6) motion. *See, e.g., Ledesma v. Jack Stewart Produce, Inc.*, 816 F.2d 482, 484 n. 1 (9th Cir.1987) ("Although the statute of limitations defense is usually raised in a responsive pleading, see Fed.R.Civ.P. 8(c), the defense may be raised in a motion to dismiss if the running of the statute is apparent from the face of the complaint."); *see also* 2 Moore's Fed. Prac.3d § 12.34[4][b], at 12-73 (1997) ("Dismissal under Rule 12(b)(6) may also be appropriate when

a successful affirmative defense or other bar to relief appears on the face of the complaint, such as . . . the statute of limitations."). In other words, if a complaint raises only claims which are barred by the statute of limitations, then the complaint "fail[s] to state a claim upon which relief can be granted."

However, the fact that the defense *may* be raised in a pre-answer motion does not necessarily mean that it *must* be. Rules 12(g) and 12(h) answer this question, at least for the defenses listed in 12(b). Rule 12(g) reads as follows:

> A Party who makes a motion under this rule may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this rule but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.

Fed.R.Civ.P. 12(g). Rule 12(h) reads in relevant part as follows:

> (1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule not included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

> (2) A defense of *failure to state a claim upon which relief can be granted*, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim *may be made in any pleading* permitted or ordered under Rule 7(a), *or by motion for judgement on the pleadings, or at the trial on the merits.*
>
> . . .

Fed.R.Civ.P. 12(h) (emphasis added).

Therefore it would seem that, if it is indeed appropriate to raise a statute of limitations defense in a 12(b)(6) motion, then that defense is not waived even if omitted from a pre-answer motion filed to assert other defenses. The fact that Rule 12(h)(2) allows a defense of failure to state a claim to be raised for the first time even at trial is in accord with the tendency of most courts to allow the affirmative defenses listed in Rule 8(c) to be raised even after being omitted from the answer (see discussion, *supra*).

Therefore it would appear from the Rules that omitting a statute of limitations defense from a pre-answer motion will not waive that defense. The Second Circuit seems to be the only circuit that has addressed this exact issue, and it has reached the same conclusion. In *Santos v. District Council of New York City*, members of one union sued a related union for enforcement of an arbitration award, and the district court dismissed for lack of jurisdiction. This decision was appealed to the Second Circuit, which remanded the case to the district court. It was only after the case was remanded that the defendant filed its answer, wherein it claimed that the suit was barred by the statute of limitations. The plaintiffs argued that the

defendant had waived the defense of statute of limitations by not raising it in the pre-answer motion it had filed to assert lack of jurisdiction. The Second Circuit found that the defense had not been waived, and that a "statute of limitations defense need not be raised in a pre-answer motion." *Santos v. District Council of New York City*, 619 F.2d 963, 967 (2d Cir.1980). In a footnote, the court explained that a statute of limitations defense *may* be raised in a 12(b)(6) motion, and as a 12(b)(6) defense, which "may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at trial on the merits," *id.* at 967 n. 4, is "by the express terms of Rule 12(g) . . . not waived by a failure to include it in a Rule 12 motion raising other defenses." *Id.*

The Second Circuit re-affirmed *Santos* in a more recent case, *Kulzer v. Pittsburgh-Corning Corp.*, 942 F.2d 122 (2d Cir.1991). In *Kulzer*, although the defendant had pled the statute of limitations as an affirmative defense, it had not raised it in any pre-trial motions, and apparently did not move for dismissal of the case on the grounds that it was time-barred until after the close of the plaintiff's proof at trial. *Id.* at 124.The district court denied the motion, essentially holding that the defendant had waived the defense by not asserting it more forcefully. The Second Circuit reversed, based on *Santos*, holding that the defendant had met the minimum requirements of the Federal Rules, and so had not waived its right to raise the defense. *Id.* at 125.

However, at least one other court has reached this issue, and it arrived at a contrary holding. In *Grijalva v. Shalala*, 1995 WL 523609 (D.Ariz.1995), the court held that

the defendants had waived the statute of limitations even though they had *never* filed an answer. *Id.* at *6. The court cites to Fed.R.Civ.P. 8(c) and 12(h)(1) for the proposition that failing to raise the statute of limitations in a responsive pleading will result in waiver, but then goes on to state: "Defendant not only omitted the argument from her responsive memorandum here, she failed to raise the limitation issue in her Motion to Dismiss, ruled on by this Court December 15, 1994. Defendant has not filed her Answer. The Court finds that Defendant is untimely in raising this defense." *Id.* This would seem to be as blatant an error as the Ninth Circuit made in *TSPC III*. However, while the decision purports to rest on the Federal Rules, it seems as if the court was motivated more by a kind of equitable tolling argument. For one thing, the case involved elderly Medicare beneficiaries alleging that the Secretary of Health and Human Services had allowed various HMOs to deny them medical benefits. For another, the statute of limitations defense, even if successful, would not have disposed of the entire case – what was at issue was the size of the class that the plaintiffs were attempting to certify. In defining the class, the court had already waived the exhaustion of remedies requirement, and might well have waived the statute of limitations defense no matter how early the defendant had asserted it, given the equities involved. *Id.* at *3. Finally, since the individual plaintiffs were not seeking benefits from the suit, but rather sought injunctive and declaratory relief to force the Secretary to monitor and sanction HMOs effectively, the size of the class mattered only in so far as more individuals with claims would help prove an "unlawful pattern or practice by [the federal government]

of ignoring abuses by HMOs." *Id.* at *2. Thus this case is hardly strong authority for the proposition that omitting an affirmative defense from a pre-answer motion will waive that defense.

Of course, it is true that, while we have assumed for purposes of the discussion so far that the supposedly waived statute of limitations defense was omitted from the defendants' motion to dismiss, this might not be entirely true. Certainly, if each possible statute of limitations that might apply to a case is treated as a separate defense to be individually raised or omitted, then the defense was unquestionably omitted. The only statute of limitations raised by the defendants in their motion was the sixty-day one. However, if the defense is regarded as simply that "the plaintiffs' claims are time-barred," then it could be said that the defendants *did* in fact raise this defense in their motion to dismiss. In fact, the defendants have been arguing strenuously, for years, that the plaintiffs' claims were time-barred – they have just been citing the wrong statute of limitations in support of their argument. Whether this is a good argument or a bad one from the defendants' point of view is debatable. On the one hand, viewing the defense as having been raised in the motion to dismiss would seem to preclude even more unquestionably the idea of its having been waived. On the other hand, if the issue is seen as having been raised, it could also be seen as having been sufficiently addressed. Or rather, it might seem that, since so much time and effort have already been spent on the statute of limitations issue, it would somehow be unfair for the defendants to raise an argument in support of that

defense now that might have resolved the question long ago had they raised it when the issue was first discussed.

This sort of vague fairness argument actually seems to have persuaded a few courts. *See United States Postal Service v. American Postal Workers Union*, 893 F.2d 1117, 1122 (9th Cir.1990) ("The APWU failed affirmatively to plead or assert the six-month statute of limitations as a defense in the district court. . . . Moreover, the APWU did not rely on the six-month limitations period in opposing the USPS' motion for summary judgment.It relied solely on the California 100-day limitations period. . . . Accordingly, the six-month limitations period was waived as a defense and we will not consider it on appeal."); *cf. Kulzer v. Pittsburgh-Corning Corp.*, 942 F.2d 122, 124 (2d Cir.1991) (reversing the district court's finding that the defendant "was 'estopped from raising [the statute of limitations defense] as it seeks to do, mid-way through the trial, after the plaintiff has closed her case- . . . . The defendants have simply waited too long and have brought this motion too late in this trial to benefit from a statute of limitations which was never properly pleaded.' ")

However, the majority of courts that have considered this issue – that is, whether a party that initially raised an incorrect statute of limitations as a defense should be allowed to raise the correct one at a later stage of the proceedings – have allowed the correct statute of limitations to be raised. *See, e.g., Zotos v. Lindbergh School District*, 121 F.3d 356, 360 (8th Cir.1997)' ("Zotos also argues that the District waived application of the 90-day limitation period by relying on the two-year statute of limitations in its memorandum in support of its summary

judgment motion. Again, we disagree."); *Yoder v. Honeywell, Inc.*, 104 F.3d 1215, 1224 n. 3 (10th Cir.1997) (holding that the defendant "did not waive the statute of limitations defense simply by pleading the defense based on the wrong choice of law"); *Reconstruction Finance Corp. v. Tuolumne Gold Dredging Corp.*, 137 F.Supp. 855, 862-63 (N.D.Cal.1953) (holding that a plaintiff who had pleaded the wrong statute of limitations was not barred from subsequently relying on the correct one), *aff'd sub nom. Walter W. Johnson Co. v. Reconstruction Finance Corp.*, 230 F.2d 479 (9th Cir.1956). In fact, some courts have even dismissed claims based on affirmative defenses never raised by the defendant at all, so long as the defendant had not waived the defense. *See, e.g., Yoder*, 104 F.3d at 1224-25 (upholding dismissal, based on New York statute of limitations, of defendant who had only pleaded Colorado statute of limitations); *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, (9th Cir.1993) (holding that even after defendant's motion to dismiss on statute of limitations grounds was denied, defendant's inclusion of defense in answer preserved defense, so that in second motion to dismiss brought on other grounds, court could rely on statute of limitations defense to dismiss case); *Costlow v. Weeks*, 790 F.2d 1486, 1488 (9th Cir.1986) (dismissing case for improper venue even though defendants had not raised the defense, since the defendants "have not yet filed a responsive pleading to the Costlows' complaint and their time to do so has not yet expired. They have not, therefore, waived their right to object to the action's improper venue. . . . ").

This fits with what seems to be the general trend for how specifically the statute of limitations defense must be

pleaded (when and if it is pleaded). Most courts have held, in keeping with the general liberality of pleading requirement of the Federal Rules, that simply asserting that "the plaintiff's claim is barred by the applicable statutes of limitations" is sufficient to raise any and all statutes of limitations that might be applicable. *Zotos*, 121 F.3d at 361 (holding that answer which simply stated that plaintiffs' claims "were barred by 'the applicable statute of limitations' " sufficiently raised the defense); *Dangerfield Island Protective Society v. Babbitt*, 40 F.3d 442, 444-45 (D.C.Cir.1994) (holding that "the government adequately pleaded the limitation defense in its answer, which reads in part: 'Plaintiffs' claims are barred by the statute of limitations' "); *Kulzer*, 942 F.2d at 125 (stating that "the defense [of statute of limitations] need not be articulated with any rigorous degree of specificity: 'The defense is sufficiently raised for purposes of Rule 8 by its bare assertion. Identification of the particular statute relied upon, though helpful, is not required in the pleading.' " (quoting *Santos v. District Council of New York City*, 619 F.2d at 967)).

Of course, this brings us back to the pleading/motion distinction again, since it is certainly not the same thing to plead something in general terms as it is to make that argument in a motion. But given the clear trend of cases not to hold a party strictly to all its waivers of affirmative defenses, even when those waivers are clearly waivers as defined by the Federal Rules (at least where there is no prejudice to the other side), and given the fact that in this instance nothing in the Rules would seem to indicate that there has actually been a waiver, the only possible reason we could see for not allowing the defendants to raise the

correct statute of limitations as a defense now would be if the plaintiffs would suffer some prejudice as a result.

Since "prejudice" does not mean simply "being more likely to lose," but rather "being deprived of a fair opportunity to present arguments against the newly raised defense," it is clear that the plaintiffs will not suffer any prejudice if the defendants are allowed to raise this defense now. *See Levald*, 998 F.2d at 687 (Where the defendant "pleaded the statute of limitations in its answer, and thus preserved the defense," and the plaintiff "had the opportunity to present argument on the statute of limitations question before the district court and on appeal," the court was not "troubled by the fact that [the defendant] had not raised the defense in the particular motion before the district court."). In arguing against the defendants' motion to dismiss the First Amended Complaints in 1992, most of the arguments the plaintiffs made against a finding that any of their claims were time-barred would have applied equally against any statute of limitations defense. Those arguments related to when their claims accrued, and whether the 1987 Plan merely "extended" the takings that had occurred under the 1984 Plan. If the plaintiffs had prevailed on these arguments, then it would not have mattered what statute of limitations was eventually found to apply.

As to the issue of what statute of limitations *should* apply, the plaintiffs had ample opportunity to argue in favor of various alternatives. In their 1993 Opening Brief to the Ninth Circuit, the plaintiffs argued that either a three-year or a five-year statute of limitations should be applied to their claims. Pls.' 1993 Opening Br. at 28-33. Of course, it did not seem to bother them then that even the

three-year statute *they* were advocating would have barred their 1987 Plan claims.[6] This was probably due to their firm but misguided belief that their 1987 Plan claims were not new claims, but merely "extensions" of their claims against the 1984 Plan, and, as such, immune from the effects of any statute of limitations. *See, e.g.*, Pls.' Resp. to Mot. NO. 3 at 23; Pls.' 1993 Opening Br. at 33-36. *In fact the plaintiffs actually point out explicitly that the statute of limitations for the § 1983 claims accruing after 1985 is one year in California and two years in Nevada.* Pls.' 1993 Opening Br. at 30 n. 27. Unsurprisingly, they did not go on to point out that the application of these limitations periods would bar their 1987 Plan claims. Since plaintiffs were thus the first side to argue that these are the correct statutes of limitations to apply to § 1983 claims accruing after 1985, it would seem odd to allow the plaintiffs to prevent the defendants from raising that same argument now.

---

[6] As discussed in note 3, *supra*, the three-year statute of limitations probably was the applicable statute of limitations for § 1983 claims which accrued prior to 1985. Thus it actually does make some sense that the plaintiffs were arguing in favor of the three-year limit, since at the time, what was at stake was more than just their claims against the 1987 plan. Their claims against both Ordinance 81-5 and Resolution 83-21 had also been dismissed as time-barred by the sixty-day Compact statute of limitations; however, these claims, unlike their 1987 Plan claims, would not have been barred by the three-year statute, since the plaintiffs' original complaints were filed within three years of the earliest date on which these claims could have been seen as having accrued (i.e., Ordinance 81-5 went into effect on June 25, 1981, and the plaintiffs' original complaints were filed on June 25, 1984).

In any case, it certainly shows that the plaintiffs are not exactly being ambushed or taken unaware by this argument. In addition, the plaintiffs also had the opportunity to argue in their Opening Brief in favor of a statute of limitations which would have allowed their 1987 Plan claims to be brought at the times they filed their First Amended Complaints – that is, the five-year statute applicable to inverse condemnation claims in California (which the Ninth Circuit had even briefly considered as a viable option for takings claims – see discussion in note 3, *supra*). So the plaintiffs have essentially already advanced all the arguments they could hope to make against the contention that their 1987 Plan claims are time-barred by the correct § 1983 statute of limitations. Thus the plaintiffs will suffer no prejudice if the defendants are allowed to raise this defense at the present time. Therefore, we hold that the defendants have *not* waived their right to raise the correct statute of limitations for § 1983 claims as a defense to the plaintiffs' claims against the 1987 Plan, and that the plaintiffs' claims against the 1987 Plan are in fact barred by this statute of limitations.

IT IS, THEREFORE, HEREBY ORDERED that the motion (Doc. # 250, motion 3) for an order dismissing all the plaintiffs' claims against the 1987 Plan is hereby ***GRANTED***.

TAHOE-SIERRA PRESERVATION COUNCIL, INC.; Richard A. Allison; Alpine Investment Company, Ltd.; AMCO, Inc.; Jeffrey B. Andersen; Beth C. Andersen; Peter J. Andersen; Janet I. Andersen; Donald F. Archibald; Jean L. Atherton; David E. Baker; Maxine A. Baker; John H. Baker; Pierino C. Barengo, et al., Plaintiff-Appellee-Cross-Appellant,

v.

TAHOE REGIONAL PLANNING AGENCY, a separate legal entity created pursuant to an interstate compact between the States of California and Nevada; the voting members of the governing body of the Tahoe Regional Planning Agency including Tony Clark, Chester A. Gibbs, Alexander Haagen, III, Stan Hansen, Thomas Hsieh, James King, Robert Pruett, James S. Reed, Larry Sevinson, Thomas Stewart, William D. Swackhamer, Peggy Twedt, Ronald D. Westergard and Norman C. Woods; State of California; State of Nevada, Defendant-Appellant-Cross-Appellee.

Nos. 99-15641, 99-15771.

United States Court of Appeals,
Ninth Circuit

Filed Oct. 20, 2000

Before: POLITZ*, REINHARDT, and HAWKINS, Circuit Judges.

Prior Report: 216 F.3d 764

---

* The Honorable Henry A. Politz, Senior United States Circuit Judge for the Fifth Circuit Court of Appeals, sitting by designation.

ORDER

Judges Politz, Reinhardt, and Hawkins voted to deny the petition for rehearing. Judges Reinhardt and Hawkins voted to deny the petition for rehearing en banc and Judge Politz recommended denial of the petition for rehearing en banc.

A judge of the court called for a vote on the petition for rehearing en banc. A vote was taken, and a majority of the active judges of the court failed to vote for en banc rehearing. Fed. R.App. P. 35(f).

The petition for rehearing and the petition for rehearing en banc are denied.

KOZINSKI, Circuit Judge, with whom Circuit Judges O'SCANNLAIN, TROTT, T.G. NELSON and KLEINFELD join, dissenting from the order denying the petition for rehearing en banc:

The panel does not like the Supreme Court's Takings Clause jurisprudence very much, so it reverses *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987), and adopts Justice Stevens's *First English* dissent. Because we are not free to rewrite Supreme Court precedent, I urged our court to take this case en banc. By voting not to rehear, we have neglected our duty and passed the burden of correcting our mistake on to a higher authority.

1. For almost twenty years, Lake Tahoe property owners have battled the Tahoe Regional Planning Agency (TRPA), which has blocked the owners' efforts to build homes on their land. The primary issue on this appeal,

the fourth in this interminable case, is a temporary moratorium that required owners to leave their land idle for almost three years. The moratorium is only one of a series of restrictions and regulations that have prevented the plaintiffs – largely families who purchased lots in the 1970s hoping to build vacation or retirement homes – from making any use whatsoever of their property. After a bench trial, the district court found that the regulation deprived the owners of the use of their property for three years, and so held they were entitled to compensation. The panel does not set aside the lower court's finding. Instead, it reverses the judgment because, in its view, a temporary regulation can *never* be a regulatory taking.

The government may conscript private property for public purposes, but the Fifth Amendment requires that it pay the owner for it. *See* U.S. Const. amend. V ("nor shall private property be taken for public use, without just compensation"). The requirement of just compensation ensures that the few are not forced to bear the cost of uses that benefit the many. Although a taking is most obvious where the government directly appropriates the property, physical occupation is not necessary. "[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 67 L.Ed. 322 (1922). The Supreme Court has explained time and again that where a regulation deprives the owner of *all* use and enjoyment of his property, this amounts to a taking and the government must pay. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). That's because the "total deprivation of beneficial use is, from the landowner's

point of view, the equivalent of a physical appropriation." *Id.* at 1017, 112 S.Ct. 2886. This compensation requirement also guarantees that the government does not do by regulation what it cannot do through eminent domain – i.e., take private property without paying for it.

Of course, most land-use regulations are not takings and do not call for compensation. A regulation effects a taking only where it denies the owner "all economically beneficial or productive use of land." *Id.* at 1015, 112 S.Ct. 2886. *Lucas* held that a South Carolina agency took two beachfront lots when it promulgated an environmental regulation that prevented the owner from building on his property. The Court concluded that, when the property owner is required "to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *Id.* at 1019, 112 S.Ct. 2886.

The only difference between this case and *Lucas* is that the regulation here had a finite duration. It was originally supposed to expire after two years and then was extended for another eight months. (In fact, its prohibitions continue to this day under subsequent development plans.) So the question is whether there is something special about a finite moratorium that relieves the government from its duty to compensate. The Supreme Court answered that question in *First English* when it said that " 'temporary' takings which, as here, deny a landowner all use of his property, are *not different in kind* from permanent takings, for which the Constitution clearly requires compensation." 482 U.S. at 318, 107 S.Ct. 2378 (emphasis added).

First English concerned a temporary development moratorium that Los Angeles enacted in response to a flood in the Angeles National Forest. First English Church challenged the ordinance, which prevented it from rebuilding damaged buildings. The California courts ruled that the regulation could only be a taking if permanent; if, on the other hand, the county decided to rescind the regulation, it ceased to be a taking. The U.S. Supreme Court disagreed, holding that "where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." *Id.* at 321, 107 S.Ct. 2378.

Justice Stevens dissented from *First English* because he disagreed with the Court's "conclu[sion] that all ordinances which would constitute takings if allowed to remain in effect permanently, necessarily also constitute takings if they are in effect for only a limited period of time." *Id.* at 322, 107 S.Ct. 2378 (Stevens, J., dissenting). Justice Stevens would have held that a temporary regulation cannot be a taking, even though it deprives the owner of all present uses, because the property retains value based upon its future uses. That reasoning, embraced by no other member of the Supreme Court, is adopted by the panel in this case.

While the opinion nowhere cites Justice Stevens's *First English* dissent, the reasoning – and even the wording-bear an uncanny resemblance. Here's why Justice Stevens disagreed with *First English*:

Regulations are three dimensional; they have depth, width, and length. As for depth, regulations define the extent to which the owner may not use the property in question. With respect to width, regulations define the amount of property encompassed by the restrictions. Finally, and for purposes of this case, essentially, regulations set forth the duration of the restrictions. It is obvious that no one of these elements can be analyzed alone to evaluate the impact of a regulation, and hence to determine whether a taking has occurred. . . . [I]n assessing the economic effect of a regulation, one cannot conduct the inquiry without considering the duration of the restriction. . . . Why should there be a constitutional distinction between a permanent restriction that only reduces the economic value of the property by a fraction – perhaps one-third-and a restriction that merely postpones the development of a property for a fraction of its useful life – presumably far less than a third?

Id. at 330, 332, 107 S.Ct. 2378 (Stevens, J., dissenting). And here is the key passage of the panel's opinion:

> Property interests may have many different dimensions. For example, the dimensions of a property interest may include a physical dimension (which describes the size and shape of the property in question), a functional dimension (which describes the extent to which an owner may use or dispose of the property in question), and a temporal dimension (which describes the duration of the property interest). . . . A planning regulation that prevents the development of a parcel for a temporary period of time is conceptually no different than a land-use restriction that permanently denies all use on a discrete portion of property, or that permanently restricts a type of use across all of the parcel. Each of these three types of regulation will have an impact on the parcel's value. . . . There is no plausible basis on which to distinguish a similar diminution in value that results from a temporary suspension of development.

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 216 F.3d 764, 774, 776, 777 (9th Cir.2000) (citation omitted). Although claiming its opinion is fully consistent with *First English*, the panel plagiarizes Justice Stevens's dissent.

The panel opinion creates a conflict with *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796 (Fed.Cir.1993), which followed the majority's reasoning in *First English*. In so doing, *Tabb Lakes* recognized that "a taking, even for a day, without compensation is prohibited by the Constitution." *Id.* at 800. Under the panel's ruling in our case, a taking for a day could *never* require compensation, because despite the temporary deprivation, the property would retain almost all of its value based upon its expected future uses.

2. One problem with the panel's theory, and the theory of Justice Stevens's dissent, is that it views the regulation's effect on a property's value as the taking itself, rather than as a test for whether the government has deprived the owner of the benefits of his property. A regulation is a taking not because it destroys value, but because "total deprivation of beneficial use is, from the landowner's point of view, *the equivalent of a physical appropriation*." *Lucas*, 505 U.S. at 1017, 112 S.Ct. 2886 (emphasis added). In the case of regulations without a

sunset provision, the deprivations of value and use are one and the same because, where the government permanently prevents the owner from putting his property to any beneficial use, no potential buyer would offer a dime for it.[1]

But this identity between value and use obviously does not hold true in the case of a temporary taking. The government can deprive the owner of all present use, but the property *might* still retain value based upon its future uses. I emphasize "might," because so-called temporary moratoria have a habit of living beyond their purported termination dates. In this case, a series of consecutive development moratoria has prevented the landowners from building any homes on their lots for the two decades since the start of this litigation. If a local government can evade its constitutional obligations by describing a regulation as "temporary," we create a sizable

---

[1] In fact, there is no clear-cut distinction between a permanent prohibition and a temporary one. Governmental policy is inherently temporary while land is timeless. Even a permanent prohibition can be rescinded and, in the fullness of time, almost certainly will be. The land may retain market value based on speculation that it will someday become usable because the regulation will be revoked. *See, e.g., Florida Rock Indus., Inc. v. United States*, 791 F.2d 893, 902 (Fed.Cir.1986) (recognizing that land might have value under a permanent regulation because a buyer could "bet that the prohibition of rock mining, to protect the overlying wetlands, would some day be lifted"); *Florida Rock Indus., Inc. v. United States*, 8 Cl.Ct. 160, 166 n. 6 (1985) ("If passively holding land against the possibility that restrictions on its use will be lifted were deemed a productive economic use, property would never be rendered useless by regulation and there could be no such thing as a regulatory taking.").

loophole to the Takings Clause. Why would a government enact a permanent regulation – and risk incurring an obligation to compensate – when it can enact one moratorium after another, perhaps indefinitely? Under the theory adopted by the panel, it's hard to see when a property owner would ever state a takings claim against such a scheme.[2]

Consider also the effect of this theory on non-regulatory takings. Let's say the government decides to use your house as a warehouse for three years. You are locked out and the government has the run of the property for that period. Is there any doubt that you have suffered a taking for which you should be compensated? Of course not. Why should the case be any different if the government simply prohibits you from using your house for three years, but never does get around to using it as a warehouse?

Indeed, it's well-established that temporary physical takings require compensation. *See, e.g., Kimball Laundry Co. v. United States*, 338 U.S. 1, 69 S.Ct. 1434, 93 L.Ed. 1765 (1949); *United States v. Petty Motor Co.*, 327 U.S. 372, 66 S.Ct. 596, 90 L.Ed. 729 (1946); *United States v. General Motors Corp.*, 323 U.S. 373, 65 S.Ct. 357, 89 L.Ed. 311 (1945). The panel opinion dismisses these cases because

---

[2] Waiting to see whether a temporary regulation is extended indefinitely will, of course, raise very serious statute of limitations and laches problems. Indeed, in this very case, the panel holds that the statute of limitations bars the property owners' challenge to a regulation that succeeded the temporary moratorium (and continues to prevent them from building homes on their property). *See Tahoe-Sierra*, 216 F.3d at 789.

they involved physical takings, rather than regulatory ones. *See Tahoe-Sierra*, 216 F.3d at 779 ("The fact that just compensation was required in these cases, however, has no bearing on the question before us."). But *First English* rejected that distinction and found that these cases provided "substantial guidance" for its holding that all temporary takings, including regulatory ones, required compensation. 482 U.S. at 318, 107 S.Ct. 2378. Again, the panel substitutes its own view of takings law for that of the Supreme Court.

These are all big problems with the panel's theory. But, of course, the biggest problem is that *First English* rejected it. *First English* held that a taking occurs when the government deprives an owner of the use of his property, even temporarily. *See* 482 U.S. at 318, 107 S.Ct. 2378 (" '[T]emporary' takings which, as here, deny a landowner all *use* of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation." (emphasis added)); *see also Lucas*, 505 U.S. at 1033, 112 S.Ct. 2886 (Kennedy, J., concurring) ("It is well established that temporary takings are as protected by the Constitution as are permanent ones."). Nothing in the opinion – or any other[3] –

[3] The panel cites a pre-*First English* decision, *Agins v. City of Tiburon*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980), as a case that applied the panel's rule against "conceptual severance in the temporal dimension." *Tahoe-Sierra*, 216 F.3d at 776. But that case is clearly distinguishable. In *Agins*, the owner sought compensation for a taking that never occurred. The city brought a condemnation proceeding against the owner but subsequently abandoned the suit. The Court rejected the owner's claim that the suit's temporary effect on the value of his property was an

suggests otherwise. By adopting Justice Stevens's dissent, the panel places itself in square conflict with the majority's opinion in *First English*.

Of course, the panel doesn't admit that its opinion aligns itself with Justice Stevens's dissent, so it must pretend *First English* said nothing relevant to this case. And so the panel does, claiming that *First English* does not address whether a temporary moratorium is a taking, because it was "not even a case about what constitutes a taking." *Tahoe-Sierra*, 216 F.3d at 777. It is true that *First English* did not have to determine whether there was a temporary taking, because it accepted the state court's conclusion that a regulation prohibiting all development was a taking while it was in effect. (The Supreme Court endorsed that result a few years later in *Lucas*.) But *First English* did decide that a temporary regulation is "not different in kind" from a permanent one: If either deprives the owner of all use of his property, then the owner is entitled to compensation for the taking. *First English*, 482 U.S. at 318, 107 S.Ct. 2378. The panel does not deny that the moratorium here, like the regulation in *Lucas*, deprived the owners of the use of their property for its duration. But it ignores *First English*'s requirement that the owners be compensated for a temporary taking.

The panel also takes shelter from *First English* in the Supreme Court's acknowledgment that it did " 'not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits,

action requiring compensation. *See Agins*, 447 U.S. at 263 n. 9, 100 S.Ct. 2138. That's quite different from a regulation that deprives an owner of all use of his property for a period of time.

changes in zoning ordinances, variances, and the like which are not before us.' " *Tahoe-Sierra*, 216 F.3d at 778 n. 17 (quoting *First English*, 482 U.S. at 321, 107 S.Ct. 2378). But that language in *First English* hardly authorizes the panel to ignore the decision altogether. Rather, it recognizes that a temporary taking only occurs when there is in fact a taking. Delays in obtaining a building permit, changes in zoning ordinances, or other temporary restrictions will not require compensation unless they deprive the landowner of all economically beneficial uses of the property for their duration. Here, the three-year prohibition on construction does not compare with the inherent delay in obtaining a permit or the frictional delay in the permitting process. The regulation clearly blocked all construction during the moratorium period.

Justice Holmes noted long ago that "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal*, 260 U.S. at 416, 43 S.Ct. 158. *First English* recognized that the costs its decision imposed upon local regulators "necessarily flow from any decision upholding a claim of constitutional right; many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities, and the Just Compensation Clause of the Fifth Amendment is one of them." *First English*, 482 U.S. at 321, 107 S.Ct. 2378. The panel's desire to ease local governance does not justify approving means that violate rights secured by the Fifth Amendment as authoritatively interpreted by the Supreme Court.

EXCERPTS FROM ORDINANCE NO. 81-5

Except as otherwise provided by this ordinance, no person shall perform any construction, work, use or activity, including without limitation, grading, clearing, removal of vegetation, filling or creation of land coverage, upon land within land capability districts 1a, 1c, 2 and 3 without first obtaining a permit from the Agency. The application for such a permit shall be reviewed and approved as a "project" pursuant to the Compact and the Rules and Regulations of Practice and Procedure of the Agency. . . .

* * *

Except as otherwise provided by this ordinance, and subject to the exceptions set forth in this subsection, no person shall perform any grading, clearing removal of vegetation, filling or creation of land coverage upon land within land capability districts 1a, 1c, 2 and 3.

* * *

Notwithstanding any other provision of this ordinance or of any other ordinance of the Agency, no person shall perform any grading, clearing, removal of vegetation, filling or creation of land coverage, within or upon a stream environment zone ("SEZ"), as described or depicted upon maps contained in the Plan.

* * *

Notwithstanding any other provision of this ordinance or of any other ordinance of the Agency, no person shall perform any construction, work, use or activity upon a lot or parcel containing an SEZ without first obtaining a permit from the Agency, the application for which permit shall be reviewed and approved as a "project". . . . Such

application shall not be approved unless it is found by the Agency that it proposes no grading, clearing, removal of vegetation, filling or creation of land coverage within the SEZ. . . .

TAHOE REGIONAL PLANNING AGENCY

RESOLUTION NO. 83-21

RESOLUTION SUSPENDING ISSUANCE OF PROJECT APPROVALS

BE IT RESOLVED BY the Governing Body of the Tahoe Regional Planning agency as follows:

1. All project reviews and approvals are suspended and no new applications will be accepted pending adoption of the new regional plan and implementing ordinances.

2. Applications currently on file with the Agency shall be the subject of consideration on a priority basis upon adoption of said plan and ordinances.

3. The terms of this resolution shall become effective on August 27, 1983 and shall expire ninety days thereafter.

4. There shall be no further business other than regional plan adoption, litigation and urgency business to be conducted at the September meeting of the Governing Body.

PASSED and ADOPTED by the Governing Body of the Tahoe Regional Planning Agency at its regular meeting on August 26, 1983, by the following vote:

Ayes: Mr. King, Mr. Stewart, Mr. Pruett, Mr. Gibbs, Mr. Swackhamer, Mr. Sevison, Mr. Robertson, Mr. Woods, Mr. Haagen, Mr. Westergard, Mr. Reed

Nays: None

Abstain: None

Absent: Mr. Hsiah, Mr. Hansen, Mr. Heikka

s/ Chairman James S. Reed

EXCERPTS FROM

1984

REGIONAL PLAN

FOR THE LAKE TAHOE BASIN

SOILS

The soil resource plays an important role related to all aspects of the physical and biological environment. Soil provides a growing medium to plants, which in turn helps bind and create new soils; the chain of events is complicated and extensive. The value of the soil resources in the Basin is measured by its ability to support vegetation and its contribution to the nutrient and sediment loads entering the streams and lakes. Two environmental thresholds are the basis for developing strategies for protection of the soil resource:

* * *

POLICIES

1. NO NEW RESIDENTIAL, TOURIST, PUBLIC SERVICE, RECREATION, OR COMMERCIAL DEVELOPMENT SHALL BE PERMITTED ON LAND CAPABILITY DISTRICTS 1-3 EXCEPT AS NOTED IN THE FOLLOWING POLICIES.

* * *

A. TRPA SHALL ESTABLISH A SINGLE FAMILY RESIDENCE EVALUATION SYSTEM, OR POINT PRIORITY SYSTEM, ON OR BEFORE JANUARY 1, 1985 (GOAL #1, POLICY #2, DEVELOPMENT AND IMPLEMENTATION SUBELEMENT).

* * *

B. PUBLIC OUTDOOR RECREATION FACILITIES ARE PERMISSIBLE USES IN LAND CAPABILITY DISTRICTS 1-3 IF:. . . .

* * *

C. PUBLIC WORKS PROJECTS ARE PERMISSIBLE USES IN LAND CAPABILITY DISTRICTS 1-3 IF:. . . .

* * *

Development within land capability district 1-3 is not consistent with the goals to manage high hazard lands for their natural qualities and shall generally be prohibited except under extraordinary circumstances involving public works. Each circumstance shall be evaluated based on the 4-prong test of this policy.

* * *

8. ALL EXISTING NATURAL FUNCTIONING SEZ'S SHALL BE RETAINED AS SUCH AND DISTURBED SEZ'S SHALL BE RESTORED WHENEVER POSSIBLE.

Steam environment zones (SEZ) shall be managed to perpetuate their various functional roles, especially pertaining to water cleansing and nutrient trapment. This requires enforcement of a non-degradation philosophy. This policy is common to the Water quality, Vegetation, Stream Environment Zone, and Wildlife Subselements and will be implemented through the Land Use Element and capital improvements program.

* * *

STREAM ENVIRONMENT ZONE

Stream environment and related hydrologic zones (SEZ) consist of the natural marsh and meadowlands, watercourses and drainageways, and floodplains which provide surface water conveyance from upland areas into Lake Tahoe and its tributaries. The boundaries of a stream environment zone can be delineated by the presence of riparian vegetation, alluvial soil, minimum buffer strips, and/or water influence areas.

* * *

POLICIES

1. RESTORE ALL DISTURBED STREAM ENVIRONMENT ZONE LANDS IN UNDEVELOPED, UNSUBDIVIDED LANDS, AND RESTORE 25% OF THE SEZ LANDS THAT HAVE BEEN DISTURBED, DEVELOPED, OR SUBDIVIDED.

* * *

2. SEZ LANDS SHALL BE PROTECTED AND MANAGED FOR THEIR NATURAL VALUES.

* * *